



Case Study

Symposium on Law, Responsibility and Governance Aotearoa New Zealand, November 2014

Author('s) name(s), organization & country of origin: Betsan Martin, Grace Leung, Linda Te Aho, Alliance for Responsible Societies, UNU RCE Waikato, Aotearoa New Zealand

Case study location: Waikato, New Zealand (plus international participants)

Case study period: 23-25 November 2014 - 2016

Case study Summary:

A symposium was held to generate impetus for developing law on responsibility by bringing together leaders engaged in such law to identify new jurisprudence in this field, such as Trusteeship of common goods and governance of resources for public good. Participants included indigenous leaders, scientists, law experts, philosophers, business representatives, economists from Hawai'i, Samoa, France, India, Brazil, Greece, Australia and Aotearoa New Zealand. Responsibility principles of diverse knowledge, common good resources and governance for public good were discussed. Case studies on policy and governance for Freshwater and Climate Change provided specific references for law. A book publication is currently in process.

Case Study :

Declaration of Interdependence and Responsibility:

Article 3. Responsibility involves taking into account the immediate or deferred effects of all acts, preventing or offsetting their damages....It applies to all fields of human activity and to all scales of time and space.

1. Purpose:

The Symposium on Law, Responsibility and Governance, was to generate impetus for developing law on responsibility by bringing together leaders engaged in such law (such as Law of Trusteeship in the US) to identify new jurisprudence in this field. Case studies on policy and governance for Freshwater and Climate Change provided specific references for law. The invitation said

The Symposium is to identify legal principles for the governance of public goods based on the notion of Responsibility, such as Trusteeship, Guardianship, Kaitiakitanga. A proposal for the governance of water by Sir Eddie Taihakurei Durie will provide a specific case study example.

Considerations will be expanded for stewardship of global commons and climate commitments for COP21. Prospects for research and strategic implementation will be identified.

A feature of the Symposium was to include indigenous interests. In the New Zealand-Pacific context, 'obligation' is a central principle of indigenous ethics and knowledge, as part of a world view and systems which integrate economy, society, environment, culture and spirituality – a 'woven universe'. Indigenous interests were represented by Māori former Judge of the High Court, The Head of State of Samoa; Hawaiian legal counsel; IUCN Director, from Tonga, Law academics from Hawaii and New Zealand along with further contributing participants.

2. Participating organizations:

- ◆ Academic institutions: Aotearoa New Zealand: University of Waikato, University of Auckland, Victoria University of Wellington, and Internationally: University of Hawaii, National Law School of India University.
- ◆ Charles Leopold Mayer Foundation, France; Alliance for Responsible and Sustainable Societies.
- ◆ International Union for the Conservation of Nature, Oceania Fiji; Environment and Conservation Organizations, New Zealand
- ◆ United Nations University Centre of Expertise on Education for Sustainable Development,
- ◆ New Zealand Maori Council,
- ◆ Business representatives: Dairy NZ and Contact Energy
- ◆ The NZ Law Foundation, members of the public.

Leaders and Keynote speakers:

Sir Eddie Taihakurei Durie - Chairperson of the Waitangi Tribunal, Former Judge of the High Court of New Zealand.

H.H. Tupua Tamasese Tupuola Tufuga Efi - Head of State of Samoa.

Pierre Calame – Emeritus Chair of the Board of Charles Léopold Mayer Foundation for Human Progress, France. Working with Institute of International Law, Collège de France and COP21.

Dr Kapua'ala Sproat - Associate Professor in Law and Director, Environmental Law Clinic, University of Hawaii at Manoa, School of Law.

Linda Te Aho - Associate Dean Māori at Te Piringa Faculty of Law, University of Waikato

Dr Betsan Martin – Director, Response Trust. Executive Chair, Alliance for Responsible Societies

Dr. Robert Joseph - specialist in Māori governance; tikanga Māori and the law; land law; indigenous peoples' rights and international law

Dr Adrian Macey - Institute of Governance and Policy Studies, Victoria University.

Taholo Kami - Regional Director of the Oceania program of the International Union for the Conservation of Nature (IUCN), Fiji

3. Symposium Summary

The Symposium was held at Waikato-Tainui College for Research and Development, Hopuhopu, Aotearoa New Zealand from 23-25 November 2014.

The Symposium was attended by sixty participants from Samoa, Fiji, Hawaii, France, India, Australia and Aotearoa New Zealand.

Recognizing the need for development of law for responsibility the Symposium identified this as the legal underpinnings of sustainable development, and for International Climate negotiations, especially moving into the period of negotiations for commitments in 2015. Case studies for the Governance of Freshwater and for Climate law were references new conceptual frameworks, future orientation, and identification of government and stakeholder initiatives. Case studies for Freshwater were:

- New Zealand proposal: for an independent Commission with a mandate for the ecosystem health of water, restitution of Māori interests alongside public good interests, and user-pays for commercial use.
- The trusteeship of freshwater based on the Constitutional provision in Hawaii. Through a 20 year law suit against the commercially motivated destruction of the natural water system in Hawaii, the Waiāhole waterways are being restored to ecosystem health.

A study of the history of legal development showed how law of duty and public good interests became diminished with the priority given to economic interests, such as in neo-liberal monetarist economics.

The International Symposium presented western and Pacific indigenous knowledge systems to attention to water and climate a starting point of policies to address pollution led into a consideration of polluter pays policies as a premise for incentivizing business, including agriculture, to manage land and water in accordance with ecological health.

Traditions of the oceanic peoples 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: 'in sidelining our indigenous reference we have made it easier to walk the path of environmental destruction'

4. How the Symposium promoted Responsibility

The Symposium was centred on Responsibility and began with an orienting presentation by Pierre Calame, and a legal history of the place of duties in liberal jurisprudence by Professor Gay Morgan.

Responsibility was given fresh illumination by Pierre Calame, traversing the philosophic, economic and policy dimensions of responsibility (adapted):

The impact of climate change on many Pacific islands is the perfect illustration that responsibility for integrity of planet is not presently part of the constitution of a global society. Neither this global society exists nor any constitutional document for it.

The two 'constitutional' pillars of the international community, that is the UN Charter and the

Universal declaration of human rights, ignore the issue of integrity of the planet. In the present situation neither international law nor tribunal would be able to have it enforced. Therefore we moved from a society which passed 'limited liability' laws to foster entrepreneurship to an 'unlimited irresponsibility society'. A court with the powers of a global prosecutor would provide legal recourse for Pacific islands to claim their right for existence.

In the ongoing inter-governmental negotiations, the big countries do not start from what should be needed to stop the ecocide but from what they think realistic to achieve without changing the way they develop. The negotiations are structured on 'national interest' and they bargain about who should start make efforts to curb the trend in fossil energy consumption, making it impossible to address the major shifts in the development model itself. Negotiators are not mandated to consider or conceive a dramatic change in the conceptual framework. State leaders are fighting climate change as an appendix for the 'business as usual' approach. 'Green growth' is the new oxymoron created to hide but in fact reveal the ongoing schizophrenia, in place of the previous oxymoron 'sustainable development'.

The 2014 G20 meeting in Australia was been a perfect illustration of this schizophrenia : the agenda is about stimulating the growth -which means an increase in green house gas emissions- and at the very last moment the climate change issue was added. Similarly in 2009, when the same leaders rushed from the G20 meeting, where they had discussed the way to avoid a global recession, to Copenhagen COP where they were supposed to take 'courageous decisions' in favor of the climate. Europe is presently the only one which is ready to take a relevant commitment with a 40 % reduction of the emissions by 2030. State leaders are now lagging behind the general opinion which understands more and more that we are heading to a catastrophe and would be ready for greater changes if ever they would have solutions at hand, even painful ones.

This scenario of the state of play on climate negotiations was the perfect segue into Dr Adrian Macey's review of negotiations and the place of ethics to achieve emissions reductions. The prospective Nationally Determined Contributions for COP21 has the potential to combine participation, ambition and compliance - the three components for an effective global treaty (Brodansky 2014). A lesson of Kyoto is that legally enforceable compliance has not been achievable, and it is now expedient to work with a transitional, or evolutionary process for reducing emissions. The UNFCCC principle of common and differentiated responsibilities according to capability provides a possible basis for an orienting principle of responsibility, which also draws on the situation of global interdependence.

Interdependence between humans and biosphere is a two-way street with the benefits of global flows of technology, goods, opportunity to share information and solidarity. Corresponding threats include disasters & ecological risk, transboundary labour, forced migration and forces of exclusion and inequality.

Professor Gay Morgan asked ' where has the West Gone Wrong' ? Morgan's review of the western legal tradition let to the discovery of a persistent thread of 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 support the market economy. 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 corporate market capitalism.

The topics included in the symposium can be summarized in the following key themes:

Transformative Law

Several of the Symposium's speakers presented proposals or case studies of laws which centre around Responsibility as a guiding principle. Sir Eddie Taihakurei Durie, former chief judge of the Waitangi Tribunal and High Court of Aotearoa New Zealand presented his proposal of Trusteeship as a legal model for freshwater management in New Zealand. This proposal was developed with the Charter for Responsibilities as a direct reference. While the New Zealand government claims that "nobody owns water", it nonetheless issues allocation consents to use water, essentially issuing ownership of water use rights which does not implicate responsibility or stewardship towards the ecological integrity of the water bodies or others affected by the use of the water. Implemented through collaborative processes, the Trusteeship is also proposed to incorporate indigenous Māori kaitiakitanga (stewardship) both as a means of redress of indigenous resource appropriation by the British and to reinstate indigenous values of stewardship and responsibility for the natural environment.

Hawaiian legal counsel and academic Kapua Sproat presented the example of using public trust law in Hawai'i to restore the practice of responsibility to restore equity and ecological integrity to waterways diverted by industrial agricultural interests. Through the establishment of this law, water was rediverted to its natural courses and allowed to support indigenous agriculture once again. These legal examples show that, using law as a vehicle for responsibility, it can be transformative and foster behavior and values changes as well as being regulatory tools.

Climate Change and Freshwater: Global Responsibility and Participatory Governance

The Symposium addressed global issues such as water governance and climate change. It emerged through the Symposium that resolving these issues require the practice of Principles of Responsibility such as "*Individual human beings and everyone together have a shared responsibility to others, to close and distant communities, and to the planet, proportionately to their assets, power and knowledge*"

The Durie proposal for an independent Commission for Freshwater, with representative trustees inaugurates a governance regime with responsibility for ecosystem integrity, collaborative decision-making 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.

The Durie plan is visionary in being designed for restitution of Maori indigenous interests as well as general public 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.

His Highness Tupua Tamasese, Head of State of Samoa, articulated that colonization and western governance has resulted in the relinquishment of responsibility of individuals, families and communities towards each other and the environment. Responsibility is instead shifted to the state or government resulting in the loss of the mentality of responsibility and stewardship by society at large. He iterated that "*our forebears had a system of law and order that was both logical and orderly and founded on a deeply spiritual and enlightened sense of morality and justice, and on a oneness and kinship with nature.*" This is in line with the initiatives in water governance in New Zealand and Hawai'i to incorporate indigenous values in the governance of public goods.

Taking this further, His Highness posited that traditional and customary models of environmental management and governance be adopted to encourage decentralisation of responsibility to all citizens –indicating attention to subsidiarity as a principle of sustainability in governance. This would not only result in more sustainable environmental management driven by an ethic of responsibility and stewardship, it would also be concurrent with a paradigm shift in the hearts and minds of citizens.

Towards Responsible Development and Economic Progress

Professor Morgan covered the transformation of western legal tradition from centering on duty and responsibility to being overshadowed by trade and capital interests in private property, individual political representation and self-interest within legal, economic and governance institutions.

Taholo Kami, Director of IUCN Oceania used the positive approach 'Let us turn a position of vulnerability into a strategy of value' Peoples of the Pacific, the Water Continent, are defined by resilience and resourcefulness, despite their exposure to climate destabilization from industrial economies. Taholo Kami used a case study of the Papua New Guinea policy framework to demonstrate leadership in responsibility. PNG, being a country rich in mineral and petroleum resources, has deferred issues of scarcity but resulted in an extractive economy causing "*permanent and ongoing damage to the biosystems of planet earth*". Thus a framework of Responsible Economic Development is now being put into place to facilitate transformation to sustainable and responsible development.

Similarly, Pierre Calame suggested that polluter-pays legislation and carbon trading is ineffective when damage to the biosphere is perceived as any other business cost. Rather, global instruments are required to acknowledge the biosphere and carbon sinks as global commons.

To draw together the learnings of the Symposium, Pierre Calame concluded that the integrity of the biosphere is beyond sovereignty. The Symposium explored ways of transforming legal and social institutions and global citizens to once again focus on the principles of Responsibility that,

"The possession or enjoyment of a natural resource induces responsibility to manage it to the best of the common good."

And,

"The responsibility of institutions, public and private ones alike, whatever their governing rules, do not exonerate the responsibility of their leaders and vice versa."

5. Proposals:

5. A. Transformative Law, Water and Atmosphere as a Public Trust, Custodial Responsibilities & Contemporary Governance, Responsible Economic Development

1. Development of *law to make the different countries and their leaders accountable for their impact on the climate*. This would imply the UN endorsement of the Universal Declaration of Human Responsibilities, and the creation of a 'global prosecutor' in charge to sue the states and leaders on the basis of the principles of the Declaration

2. To propose and *include the responsibility principles in State constitutions*, with provision that leaders could be sued for failure to comply with their responsibility ; *Include in the constitutions:*

♦ *responsibility to preserve the integrity of the planet with stewardship of natural resources and ecosystems*

- ◆ “constitutionalize” the laws, and ensure they conform to the constitutional principles;
- ◆ Provide an efficient means for the global prosecutor to sue in front of national courts.

3. *Promote stewardship of natural resources*, such as in the Hawaii model of water as a public trust, in order to hold the governments responsible to define relevant governance regimes for the different natural resources they are not the owners of but the stewards in the name of the whole population, the global society and the future generations;

4. Consequently, *acknowledge that climate should be considered as a global public trust*, with an adequate governance regime to insure that it is used in the public interest.

5 B. Build a collective voice with multi-stakeholder partner groups

Participants were enthusiastic 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. The Samoan system of accountability in decision-making, ‘Tulafono’, is a model for multi-stakeholders dialog is similar to the ‘citizen panel model’ of participatory democracy in which complex issues can be debated locally.

In reality the continuation of this interest has not been to create a new group, rather it is being continued through a diverse series of actions which show enhanced attention to responsibility

1. A contract for a book on Law, Responsibility and Governance was negotiated with Greenleaf Publishers; edited by Linda Te Aho, Betsan Martin, Maria Humphries.
2. Preparation and teaching of a **Law course at University of Waikato ‘Water Law’** – a fourth year degree Law paper. ET Durie's papers are keystone references for the course. Teaching outcomes:
 - ◆ Understand traditional Māori concepts of regulation and control of water
 - ◆ Critically engage with competing ideas about rights and responsibilities in relation to water
 - ◆ Understand legislative and policy frameworks in relation to water
 - ◆ Understand Treaty of Waitangi settlement processes in relation to water
3. The Symposium resulted in further papers on the [Framework for Governance of Freshwater](#) to amplify the governance proposal presented at the symposium by Sir Eddie Durie and a synopsis published on the A-Response website: www.response.org.nz
4. A follow up symposium **for Pacific Rim partners was proposed with IUCN partners in 2015**. The intention was 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, to generate further development of indigenous reference for sustainability, legal liability for environmental damage, and frameworks of legal responsibility. This was not supported by IUCN stakeholders (many of these were not at the 2014 symposium and did not have the knowledge of indigenous systems as a basis to support the initiative)

Ironically, an IUCN Strategic Policy meeting in Fiji, 2015, accepted a responsibility framework for IUCN Oceania and for IUCN International. There is strong advocacy for rights frameworks for environmental policy in IUCN. A briefing paper on responsibility and public good interests was prepared and circulated, and this approach approved. Follow up will be needed to track policy implementation. An opportunity comes with the World Conservation Congress in Hawaii, Sept 2016, in which Betsan Martin has a workshop with three international lawyers from Uganda, US, France, to address rights and responsibility in law. Law. A recent legal case on Asbestos shows a transition in law from liability for proving damage moves to liability for creating danger

5. **Governance of Freshwater** is a key issue for New Zealand, with policy development through the National Policy Statement and National Objectives Framework, and the Iwi Leaders Forum – A Maori Partner coalition. The Durie water proposal continues to be circulated and discussed by scientists, legal academics and policy analysts including Māori researchers, and the responsibility and public interest framing is increasingly evident in policy advocacy. Never-the-less economic interests in water continue to be in tension with environmental interests and public good policy.
6. **COP21**. A custodial voice of the Pacific region focuses on common goods and climate justice – an approach which was central to this Symposium at the end of 2014, and can be heard influencing the COP processes, culminating in the 2015 Paris Agreement, and ambition of limiting warming to 1.5degrees. This is a direct outcome of the advocacy of Pacific island states which will not survive the rising oceans, even limiting temperature increase to 2 degrees.
7. Impetus to **UNU Waikato Centre** with responsibility as a core reference for sustainable societies, and a cutting edge interest in interdisciplinary research to develop integrated knowledge. The UNU Centre at Waikato has achieved engagement with faculties of Law, Education, Environmental Science, Māori Studies.

The UNU flagship initiative is for interdisciplinary research and knowledge development. This has met the challenges of discrete knowledge categories in the university, administrative systems and funding designed for disciplinary silos, and limited capacity of academics to take on additional programmes that require collaboration and stakeholder engagement and with regional councils, business, education and civil society organizations.

The 2014 Symposium has been a spur to renewed momentum in 2016 – highlighting that new conceptual frameworks, knowledge and systems take time and endurance to become established in practice.