

“Preservation of Ancient Cultures and the Globalization Scenario”

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Theme 3: Cultural conflicts and tolerances

## **“Te Mātāhauariki – the Imminent Dawn”: Customary Law in a Globalized Society**

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### ABSTRACT

Te Mātāhauariki, “the imminent dawn” is the name chosen for a research institute at the University of Waikato devoted to research for a more socially inclusive future for Aotearoa New Zealand. The institute’s researchers include members of the legal profession, independent scholars and academic researchers from several universities. They are engaged in research on jurisprudence, governance, institutional design and redesign, and are also actively involved in the dissemination of the research results. The work of the institute is concentrated around the theme of “laws and institutions for Aotearoa New Zealand”, exploring ways in which the legal system of Aotearoa/New Zealand can evolve so as to accommodate the best of the values and concepts of both sets of signatories to the Treaty of Waitangi. The institute thus seeks to facilitate the development of a cohesive jurisprudence, and to offer models for the practical application of ideas arising from research, discussion and reflection to appropriate areas of the nation’s legal system. A key principle underlying this research programme is the legal proposition that our existing law not only permits but requires, the adoption, subject to certain tests, of Māori customary law into the common law administered in our Courts. A major part of the programme is therefore devoted to the conceptual underpinnings, operational characteristics and development of Māori jurisprudence and the ways in which this can enrich the legal and institutional arrangements in Aotearoa/New Zealand both at national and local levels.

We are warned in a United Nations report quoted in the background material prepared for this conference that:

Globalization ... carries with it a threat of homogenization and uniformization and it threatens the social organization and the way of life and deprives people of their long cherished spirituality and it should not be based on exploitative economic relationships.<sup>1</sup>

The excellent report issued by the World Commission on Culture and Development, *Our Creative Diversity*<sup>2</sup>, also commented on the “danger of cultural goals being overwhelmed by purely commercial objectives”.

A few generations ago, within the lifetime of many of the present inhabitants of the planet, such dangers, while recognized, were of immediate concern mainly to the former colonial powers as their glory waned, and to the urban élites in some of their former colonies. For quite a large proportion of the world’s population, life went on as it had, if not since time immemorial, in much the same way as it had in living memory. This is no longer the case. No-one, whether in the largest city or the tiniest forest campsite in the remotest part of the Amazon, can remain unaffected by globalization in some way or other. The threats and dangers certainly are there, but so are great opportunities. The greatest – the realization that we are one family, that we can no longer say that the ills of the world are someone else’s business, that we each and together have an inescapable part to play in ensuring that the effects of global forces are good or ill, has been stated succinctly by Jacques Delors in his speech at the Rio conference on Environment and Development in 1992, quoted on page 33 of *Our Creative Diversity*:

The world is our village: if one house catches fire, the roofs over all our heads are *immediately* at risk. If any one of us tries to start rebuilding, his efforts will be purely symbolic. Solidarity has to be the order of the day: each of us must bear his own share of the general responsibility. [Emphasis added]

These sentiments have been stated many times, sometimes in almost identical words (as, for example, the English poet John Donne’s famous phrase, “No man is an island”. The difference is that when John Donne wrote his poem 400 years ago, his sentiments were statements of principle, and one could, most of the time, put off acting on them for another day; now, they are statements also of fact—the risk is truly immediate, and action cannot be delayed.

Our cultural and linguistic diversity is as valuable as the biological diversity upon which the world depends for its proper functioning. While this diversity should indeed be preserved, our ancient cultures, like the flora and fauna which surround us, are worthy of more than preservation. Preservation is important, but equally important are conservation and development.

By “development” I do not mean transformation of our cultural heritage into what Benjamin Barber<sup>3</sup> has so aptly called “McWorld”, but rather the kind of development advocated, for

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<sup>1</sup> The report of the UNESCO conference on Cultural Policies for Development held at Stockholm (1998), p.73.

<sup>2</sup> Paris: World Commission on Culture and Development, 1995, p. 235.

<sup>3</sup> *Jihad vs. McWorld*, New York: Ballantine Books, 1996.

example, by the Indian economist Amartya Sen<sup>4</sup> – a development which brings with it the freedom to individuals and peoples to develop their capabilities, including, most importantly, the capability to be themselves.

The ancient cultures which have survived and are represented here today are those which have grown, adapted, and transformed themselves. On the whole, they are not cultures which have concentrated solely on preservation. Those which have remained static, like the fictional community in the Amazon described in V. S. Naipaul's novel *A Way in the World*<sup>5</sup>, are in constant danger of becoming like fossils trapped in amber, perfectly attuned to the one environment with which they have lived from time beyond memory, but having lost the capacity to change while staying the same. We are lucky in New Zealand to have creatures like this – our famous tuatara: a most interesting and noble reptile, but one which has reached the end of its particular evolutionary line. The tuatara does not have much choice in the matter – people are privileged in that they can make choices if they really want to. Those who are very clever can appear to change without really changing at all – chameleons are a good illustration of this: their cousin the New Zealand gecko stays a bright shining green, while its Madagascan relative can assume many different colours of the rainbow, but purely for cosmetic purposes; when it turns the switches off, it goes back to the way it has been for a very long time.

Indeed, if we shift our attention from animals to plants, we have in our New Zealand ecosystem some wonderful correlates of cultural development and diversity. The beautifully fragrant raukawa shrub is one of many which has quite different leaves when young from those on the mature plant; essentially, of course, a raukawa is a raukawa, but the changes in its form represent a maturity and development which is not reversible. We also have a magnificent forest tree which is the prototype for the ultimately hegemonic culture – the rata, which develops itself at the expense of those with which it comes in contact, starting off as a vine which scrambles up a tall tree, and then proceeds to choke its host as it transforms itself into a forest giant. Then we have trees which have grown together as seedlings and eventually merge into a single trunk with two heads – one tree or two, who can really say? Perhaps this is Aotearoa / New Zealand. Or perhaps our national symbol the kauri tree is more evocative of our cultural destiny – another giant, which appears to be a single organism, but which in fact may have 30 or 40 species of epiphytic plants and many other creatures, from birds to bugs, nestled among its upper branches in an interdependent ecosystem of their own.

It is the ancient cultures of East, West, North, and South, of humanity, that have had the opportunity and the confidence to embrace change and to cope with diversity which have always had a truly global outlook. The ancestors of the Polynesians left the mainland of Southeast Asia 4 or 5 thousand years ago and set off through Taiwan and the Philippines to reach and colonize Madagascar, Easter Island, Hawaii and New Zealand and many points in between. Later they were joined by people from the other ends of the earth. All peoples have made similar journeys through time; it is the experience of space and the interaction with others which has varied so much; some, like the Malayo-Polynesians have had millennia of movement with an almost insatiable thirst for new horizons, others have had millennia of rest; but now the travelers and the stay-at-homes are at most a few nanoseconds away from each other by satellite phone, and at most days rather than months, years or centuries from personal contact.

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<sup>4</sup> See *Development as Freedom*, New York: Knopf, 2000.

<sup>5</sup> New York: Knopf, 1994.

And thus, since even the most hospitable of those who stay at home do not always welcome travelers who decide they have found in their hosts' back yard (or perhaps right in their house) a good place to settle down permanently, we have the likelihood of conflict and the opportunity, indeed the challenge, to develop tolerance.



It is a response to this kind of challenge which brought forth Te Mātāhauariki, an institute at the University of Waikato devoted to research for a more socially inclusive future for Aotearoa New Zealand. The name itself is taken from a Māori word evoking all the promise, energy and potential of a new beginning, beautifully expressed by the late Hohua Tutengaehe in these words: “Just after sunrise, when the darkness is separated by the

dawning of the day, a gentle breeze strokes the distant horizon to landfall to reveal layers of cloud above the horizon and dawn gives way to the light of day”.

The institute's researchers include members of the legal profession, independent scholars and academic researchers from several universities, advised by a panel of distinguished scholars, jurists and administrators. They are engaged in research on jurisprudence, governance, institutional design and redesign, and are also actively involved in the dissemination of the research results. The work of the institute is concentrated around the theme of “laws and institutions for Aotearoa New Zealand”, exploring ways in which the legal system of Aotearoa/New Zealand can evolve so as to accommodate the best of the values and concepts of both sets of signatories to the Treaty of Waitangi. This research programme has been funded from the outset by the Foundation for Research, Science and Technology.

When the institute was set up at the end of 1996, there was a special concern with “biculturalism”, a concept then (and to some extent still) in vogue. This reflected the increasing importance given to the principles of the “Treaty of Waitangi”, whereby in 1840 the United Tribes of New Zealand and a large number of chiefs from tribes outside that confederation handed over the governance of the country, and either ceded or lost sovereignty (depending which version or translation of the Treaty one takes as definitive) to the British Crown. However it soon became clear that both Māori and non-Māori mainstream cultural constellations in this country are polyphyletic in their nature, combining in distinctive ways ideas and practices drawn and transmuted from many sources into their traditions, laws and institutions. What the members of the institute are seeking is a coherent jurisprudence, derived from these polyphyletic traditions, one which will have sufficient flexibility and robustness to meet the future needs of the citizens of Aotearoa/New Zealand as individuals and as members of varied collectivities, familial, ethnic, social cultural and political. We have found that the dualism of the past (and indeed, in much present-day discussion and scholarship) is unhelpful and untrustworthy. The institute through its work thus aims to take advantage of the “hybrid space” that opens between the colonizing and the colonized in this country's post-colonial era. With this comes the possibility of a new position which need not replicate either the colonial or the indigenous system. Nonetheless, the identification and examination of the conceptual underpinnings and operational characteristics of Maori jurisprudence forms a vital part of our programme, as this aspect of our legal heritage has been given scant attention over the last century, negligence which is now causing many difficulties as Māori concerns can no longer be ignored legally or socially. The overall objective of the institute's work is to find and indeed strengthen the points of

convergence, so that unity and diversity within our legal system, and our society, can coexist in a creative rather than destructive tension.

The core question for us, one which is central to contemporary constitutional and political debates now gaining momentum here in Aotearoa/New Zealand is this: If laws and institutions shape and reflect the values of a society, do the laws and institutions of New Zealand adequately fulfil that role? Do they reflect the values of both our founding cultural conglomerates as these have interacted and developed together (whether in harmony or opposition) over the last two hundred years? If not; how might they be imagined and adapted to do so?

Imagination here is the key word. We cannot answer this last question ourselves, but through our research programme we are trying to build up and transmit a body of knowledge, old (but until now often forgotten) and new, to stimulate and inform a national conversation. We hope that the outcome of this will eventually be the establishment of socially inclusive laws and political and legal institutions in Aotearoa/New Zealand which are a true expression of the partnership dimension of the Treaty of Waitangi reflected in our national coat of arms.

Such laws and institutions would support and strengthen a social environment which guarantees to citizens the freedom to develop the capacity to be Māori and be a New Zealander, “Aotearoan” and “Pacifcan” as well. Aotearoa / New Zealand, after all, is the southernmost outpost of Polynesia in the South Pacific, and the southeastern extremity of Southeast Asia. Geologically the mid-point of Gondwanaland, more or less staying put while Australia and India drift off to the northwest and south America drifts off to the east. It is thus in its physical and human existences a crossroads and a place with a special destiny.

In this setting, the Māori cultural heritage, both ancient and modern, is especially important because it is the first human society to establish itself here; Māori culture, exotic like all immigrant cultures to begin with, indigenized itself in its new environment, indeed, was indigenized by the land itself. These aboriginal human arrivals brought with them only ideas, aspirations, and very few material possessions, unlike the more recent wave of settlers who quite literally brought everything from their old homes, including the piano and the kitchen sink. In order really to be part of the place, they therefore have much to learn from those who served their apprenticeship as true pioneers. And everyone here has much to learn also from the successes and failures of others who have been engaged elsewhere in similar struggles and enterprises.

The Mātāhauriki programme therefore has looked carefully (with a view to discovering insights relevant to Aotearoa) at ways in which laws and institutions have been transformed from hegemonic to inclusive in form and content, and what kinds of arrangements are present in our own system or have been worked out more fully in others for reflecting the creative diversity and mutual respect among peoples to which we aspire.

An especially important part of our work has been (and remains) exploring and identifying key concepts, philosophies, beliefs, values, customs, ethics and practices which inform Maori law and jurisprudence; assessing the influence and impacts of colonisation upon Maori law and jurisprudence; evaluating the development of Maori law and jurisprudence in contemporary times; and assessing the extent to which Maori law and jurisprudence might be better utilised in the current political and legal institutional arrangements in Aotearoa/New Zealand. This has been done in a variety of ways, including the publication of some major works on Māori leaders and their encounters with their colonial counterparts, legal issues

affecting Māori historically and currently (often one and the same thing, recycled or updated).

A major development along these lines over the last two years has been the work on *Te Mātāpunenga*<sup>6</sup>, a major reference work which will bring together and present in accessible form the historical uses and meanings of a wide range of key terms and concepts from Maori customary law. The source material for this work includes the huge body of unpublished manuscript material held in specialist libraries and private collections, the nineteenth and early twentieth century Māori newspapers, and consultations with traditional experts on Māori culture, in addition to published sources. We are also concerned with the history of the words and ideas as reflected in their parallels in earlier stages of the Austronesian languages from which Māori is descended, and how these ideas have developed in other Pacific jurisdictions. Through *Te Mātāpunenga*, the institute aims to lay the intellectual foundation for those wishing to engage in the ongoing public discourse on the future shape of a legal system of our country and the possibilities of convergence of Maori and English-derived common law traditions.

In this connection, we have also commenced a series of seminars with leading Māori scholars, traditional and from the academic world, seeking their views on the concepts and values underpinning Maori legal notions and ideas relating to jurisprudence, and how formulations of these concepts should be interpreted. This is a very important task, as New Zealand law increasingly requires account to be had of Māori customary law and usages, and knowledge of what these were and are is not widely distributed, even within the Māori population. The non-Māori has libraries of law books to consult in such circumstances, an advantage which *Te Mātāpunenga* is attempting to blunt. This is a very practical necessity; to give just one example, a controversy recently erupted over a decision by the North Shore City Council in Auckland to transfer sand from a beach outside its jurisdiction to one within. A Māori consultant retained by the Council said that this would be a breach of protocol, and that the sand would have to be obtained from within the local harbour (at far greater expense). This assertion was later contradicted by a local Māori elder, and by officials of the tribal organization speaking for the traditional guardians of the area in question. Our work would not settle such questions, but it would provide an authoritative reference point from which principles underlying relevant decision-making could be adduced.

In this part of our work, we place a lot of emphasis on what the Confucian tradition calls the “rectification of names”. However, we are very much aware of the need to remember the past without being slavishly bound by it, and of the critique of the Confucian certitudes by the equally eminent philosopher Chuang Tzu, summarized here by Kuang-Ming Wu<sup>7</sup>:

Words are the tools and trails of our discernment of life. They are an abstractive sieve which captures not only some general themes but clues to the pulsations of the real. They are useful because they constantly refer us back to the thick “mud” of existence where the dynamic of ambiguity persists in its own renewal.

The results of the research are disseminated in a wide variety of ways – through discussion papers, publications, seminars, gatherings of various kinds, formal and informal consultations with interested parties, the world wide web, print and broadcast media. The institute’s website URL is <http://lianz.waikato.ac.nz/>. Nonetheless, despite the sage words which

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<sup>6</sup> Literally, “a source of useful knowledge”, for example, an encyclopaedia.

<sup>7</sup> *Chuang Tzu: World Philosopher at Play*, New York: Crossroads, 1982.

emanate from our writings and discussions, we are also aware of the need to keep open our minds, hearts and imaginations:

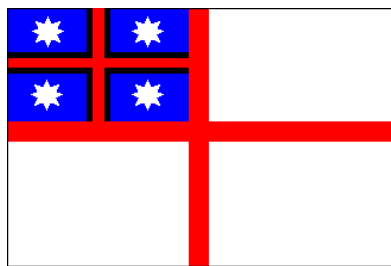
What is needed in life is not authoritative advice but warning against taking platitude to be oneself. We do not need norms and information but evocative metaphors to provoke authenticity.<sup>8</sup>

Ancient cultures may be under threat from globalization, but this is nothing new. What is new is that the threat is present everywhere, all the time. But there is something to rejoice about in this, too – we are also in a position now, for the first time, to counter such threats, anywhere, any time. Thus we can echo with some confidence, from our various perspectives, Michel Quoist's words<sup>9</sup>:

Many people say 'Everything is falling apart. A world is passing away.' But I say, 'A world is being born'.

**This document has been made available through the website of the Taitokerau Sustainable Development Research Group**

<http://www.rakiora.maori.nz>



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<sup>8</sup> *Ibid.*

<sup>9</sup> *Christ Is Alive!* Dublin: Gill and Macmillan, 1971, p. viii.