

# *New Zealand Journal of Public and International Law*



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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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THIS ISSUE INCLUDES CONTRIBUTIONS BY

Joshua Aird	Sir Geoffrey Palmer
Klaus Bosselmann	Nicole Rogers
Peter D Burdon	Nathan Ross
Joel Colón-Ríos	Greg Severinsen
Benjamin F Gussen	Linda Sheehan
Catherine J Iorns Magallanes	Gerald Torres
Gay Morgan	

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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# CONTENTS

## SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

Foreword: New Thinking on Sustainability <i>Catherine J Iorns Magallanes</i> .....	1
Setting the Scene for "New Thinking on Sustainability" Conference <i>Sir Geoffrey Palmer QC</i> .....	17
Sustainability Alternatives: A German-New Zealand Perspective <i>Klaus Bosselmann</i> .....	25
On the Problem of Scale: The Inextricable Link between Environmental and Constitutional Laws <i>Benjamin Franklen Gussen</i> .....	39
Shifting Paradigms: Berry's Earth-Centrism – An Effective Noble Lie? <i>Gay Morgan</i> .....	65
Implementing Rights of Nature through Sustainability Bills of Rights <i>Linda Sheehan</i> .....	89
Comment: The Rights of Nature and the New Latin American Constitutionalism <i>Joel Colón-Ríos</i> .....	107
New Zealand's Defective Law on Climate Change <i>Sir Geoffrey Palmer QC</i> .....	115
Translating Climate Change <i>Gerald Torres</i> .....	137
Comment: Deepening the Path of Translation – Differentiating Arguments from Power from Arguments from Legitimacy in a Heterodox World <i>Gay Morgan</i> .....	153
Wild Law: A Proposal for Radical Social Change <i>Peter D Burdon</i> .....	157
"If you Obey all the Rules you Miss all the Fun": Climate Change Litigation, Climate Change Activism and Lawfulness <i>Nicole Rogers</i> .....	179

Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone <i>Catherine J Iorns Magallanes and Greg Severinsen</i> .....	201
Student Essay: Carbon Emissions and Electric Cars – Introducing the Potential of Electric Vehicles in New Zealand's Climate Change Response <i>Nathan Jon Ross</i> .....	235
Book Review: From Object to Subject: The Practice of Wild Law <i>Joshua Charles Raymond Aird</i> .....	249

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# COMMENT: DEEPENING THE PATH OF TRANSLATION – DIFFERENTIATING ARGUMENTS FROM POWER FROM ARGUMENTS FROM LEGITIMACY IN A HETERODOX WORLD

**Gay Morgan\***

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*This comment is made in response to a public lecture by Gerald Torres on "Translating Climate Change" given at Victoria University of Wellington in July 2014.*

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Torres' discussion seeks a usable and useful jurisprudential paradigm which can be usefully translated from the legal traditions which have variously evolved from British jurisprudence and liberal thought, across heterodox world views.<sup>1</sup> He hopes that the suggested paradigm can be a tool to support both the idea of legitimate authority and the duty to use that authority to act for the benefit of the people. In doing so, he differentiates power from authority and embraces the ideas that ultimate authority flows from the people and that a government's fundamental duty is to protect the well-being of the people. That is a protective duty and a trust the people have bestowed upon that institution in exchange for accepting and respecting its claim to legitimate authority. In a word, he recasts his discussion in the constitutional context of *Salus populi suprema lex*,<sup>2</sup> with *Salus populi* necessarily grounding the legitimacy and fundamental duty of governments. Honouring that trust and duty, perhaps however bestowed, is part of what distinguishes authority from raw power. Reaching into United States Indian law and other jurisprudence, Torres proposes the Public Trust doctrine which is applied to United States Federal Government's duties vis-à-vis tribal and public resources, as a useful working model of that primary and justificatory duty of governments to act as fiduciaries vis-à-vis their people. He argues that duty is one which requires the protection of natural resources in such a

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1 Gerald Torres "Translating Climate Change" (2015) 13 NZJPI 137.

2 The good of the people is the highest law.

way that current and future generations are protected from a loss of well-being due to the degradation of those resources. Torres' sees the United Nations Declaration on the Rights of Indigenous Peoples as a possible lever for translating States' now formal international duties to protect indigenous cultures and resources into a universal duty to protect the viable living environment of all peoples. Under such a conception of the fundamental requirements for legitimacy, governments would be required to act to protect their peoples from climate change, as to do otherwise fails in their fiduciary duty to protect both the public and their common resources from harm.

This echoes the insights of that early British seeker of the foundations of legitimate governmental authority and the duties attendant to that authority, Thomas Hobbes. I have proposed, and do propose, that Thomas Hobbes was essentially correct in maintaining that legitimate governing authority must be anchored in both the duty and the ability to maintain the safety of the people. I argue however that the safety of the people is a phrase that encompasses more than being kept safe from invaders and criminals, and believe Hobbes would agree. However, while the exchange of a monopoly on the use of force, or the authority to set the rules by which force may be employed in exchange for guaranteeing the people's safety, may have been a plausible argument for the legitimacy of State authority during and after the Reformation, the post-Reformation States do not and arguably never did deliver that safety. From his writings one can discern that the Hobbesian conception of safety was not overly restrictive and might plausibly be extended to cover more than mere public order. I argue for a particular conception of Safety as foundational to legitimacy and propose the role Safety ought to play in determining the legitimacy of a governing authority. Torres' Public Trust doctrine proposal is of a similar vein and I have some ideas about how one could go about translating it across heterodox worldviews,<sup>3</sup> without falling into what I have termed the liberal paradox<sup>4</sup> of imposing liberal beliefs on non-liberals, in essence forcing people to be free and thus destroying their normative context and concomitant ability to pursue their good within that framework.

I think Torres' Public Trust proposal resonates with Safety as a legitimising concept, and suggest "shared bads"<sup>5</sup> as a translation mechanism for implementing internationally shared requirements for substantive legitimacy. 'Shared bads' respects heterodox world views, avoids the liberal paradox and assuages the liberal conscience. I will elaborate, as Torres' Public Trust doctrine, while a well-developed legal doctrine has long been, as he notes, divorced from any legitimising role. Here is where Hobbes' ideas tying safety to legitimacy, when properly understood as Safety, and translated across heterodoxies through 'shared bads', can help.

Safety, as a legitimising concept, rightly encompasses more than protection from external or internal physical attack. It encompasses more than protection of property. The conception of safety

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3 This is a fundamental part of Torres's challenge and one which he leaves relatively unanswered.

4 Gay Morgan "Reflections on Pluralist Conundrums" [1998] 2 Yearbook of New Zealand Jurisprudence 71.

5 Gay Morgan "Searching for Common Ground" [2002] 12 Journal of Contemporary Legal Issues 757.

which satisfactorily grounds both a claim and a base line for legitimacy encompasses an adequate physical, political and psychic space within which all individuals of a community can flourish. Such a conception is flexible enough to accommodate the concerns of an international pluralist if, rather than focusing on what human goods are necessary to achieve a legitimating arena of safety, the fundamental criteria for judgment are what 'shared bads' of humanity must be avoided. While liberals and non-liberals often deeply disagree as to the good,<sup>6</sup> there is a considerable consensus, supported both theoretically and empirically, as to the fundamental human bads. In that way, Isaiah Berlin's pluralist enterprise of recognising that different peoples will arrive at disparate balances of incommensurable but essential human goods can be respected, while providing a normatively defensible approach for making judgments as to legitimacy. Focusing Torres' suggested translation on the ability and success of a system in avoiding 'shared bads' leads neither to standard-less relativism nor to the paradoxical result of imposing liberalism's balance of incommensurables on those who would choose otherwise. Safety, properly conceived, can provide the framework for achieving a plausible and usable set of 'shared bads' or, alternatively, that 'shared bads' can anchor those requirements for safety which an authority must meet to successfully claim legitimacy.

One of the three fundamentals of a Safety paradigm, as mentioned above, is a safe physical environment. This would necessarily encompass governmental duties to mitigate the environmental degradation and destruction fuelling climate change, if only to protect the population from the threats to their physical and psychic safety from the storms, sea level rises and other dangerous phenomenon driven by rising levels of heat in the oceans and atmosphere. One 'shared bad' widely agreed upon across heterodox world views is the destruction of the relevant people's continued ability to persist successfully as a people in a territory, and that is what climate change imperils. Safety also encompasses translatable criteria of the sort which Torres hopes become embedded into international legitimacy norms.

The availability of external criteria for assessing legitimacy is important, as while the internal perspective is necessary for a system to achieve and maintain legitimacy, it is not sufficient. Just as efficacy in maintaining order and governing ought not be enough to attain the mantle of legitimacy from the external perspective, mere evidence of legitimacy having been internally conferred ought not be enough. Even procedural legitimacy ought not be enough, as many processes for gaining the mantle of legitimacy do not lead to an adequate arena of Safety within which all members of the community may lead their lives. There must be evidence that the internal perspective is based on some sort of informed consent, rather than on a practical inability or a lack of opportunity to have any other perspective. Such evidence would be the extent of the arena of Safety enjoyed by the governed.

Developing a Safety conception of legitimacy which is based on whether an authority, local, national or supranational effectively avoids those 'shared bads' which undermine human flourishing

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6 Including disagreeing about those versions of the good encapsulated in many international Human Rights documents.

would both broaden and narrow the permissible set of legitimate governing systems. It would provide an effective and inclusive standard of substantive accountability for those authorities who would claim legitimacy, however procedurally constituted, while encouraging those same authorities to adhere to predictability and procedural regularity to avoid the widely shared Hobbesian bad of Chaos itself. Such a standard would provide a conception of legitimacy with normative requirements which actually went to Hobbes' original insight that a claim to authority must be grounded in assuring a safe arena within which people can live their lives without dread, while still leaving each community to pursue its own balance of the incommensurable human goods. It is workable, it is not ideologically driven, hence is widely translatable, and it goes to the very core concerns of our continued diverse human flourishing and of what is necessary for authority to justify itself.

As even the President of the United States has declared climate change to be the greatest danger facing humanity, those governments which do not fulfil their duty to preserve the Safety of their people's environment, under Torres's Public Trust doctrine, under Hobbes' properly understood Safety doctrine, or otherwise, lose their claim to authority. Hobbes, like Locke,<sup>7</sup> reserved the right of the people to put in place a new government if the existent one was not performing its side of the contract, as both agreed with Black<sup>8</sup> and Torres that the people hold at least radical title to all rights. Hence, those governments which are not acting to effectively combat climate change are not only violating their Public Trust, they may very well be losing any legitimate claim to authority they ever had such that even absolutist Hobbes would say, enough. This is where Torres' article also leads, and this is where we, qua humanity, may need to go.

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7 See J Locke *Two Treatises of Government* (Liberal Arts Press, New York, 1952).

8 See Charles L Black *A New Birth of Freedom: Human Rights, Named and Unnamed* (Putnam and Grosset, New York, 1997).

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