# SETTING THE RECORD STRAIGHT ON HAWAIIAN INDIGENEITY

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## I. INTRODUCTION

On October 30, 2003, graduate students at the University of Hawai‘i at Mānoa formed the *Hawaiian Society of Law and Politics* (HSLP). The term Hawaiian was used in its national and geographical context in relation to the Hawaiian Kingdom and not in its ethnocentric sense as created and maintained through United States legislation, i.e. blood quantum. The term Hawai‘i is used interchangeably with the Hawaiian Islands.

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According to its constitution, HSLP's membership was multi-disciplinary and open to all enrolled students, faculty and staff of the University of Hawai'i at Mānoa. Given that Hawai'i had been recognized as an independent State since 1843 and for half a century entered into treaty relations with other independent States, HSLP was established as a student organization that applies public international law, as between States, and applicable theories to Hawaiian history. HSLP promoted the development of curriculum on the subject of Hawaiian statehood under international law for the University of Hawai'i system.

HSLP was primarily an outgrowth of the international awareness of Hawaiian statehood brought about by the *Larsen v. Hawaiian Kingdom*, PCA no. 1999-01, that was held at the Permanent Court of Arbitration (PCA) in The Hague, Netherlands from 1999-2001, where I served as lead agent for the Hawaiian Kingdom's legal team.[1] Before facilitating the formation of the *ad hoc* arbitral tribunal, the PCA verified the continued existence of the Hawaiian Kingdom as a State despite over a century of belligerent occupation by the United States and its purported annexation of the Hawaiian Islands in 1898.[2]

Distinct from the subject matter "jurisdiction" of the *Larsen* ad hoc arbitral tribunal, the Permanent Court of Arbitration (PCA) must first possess institutional "jurisdiction" by virtue of Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes (I) before it could establish the *ad hoc* tribunal in the first place. According to the United Nations, there are three types of jurisdictions at the PCA, "Jurisdiction of the Institution," "Jurisdiction of the Arbitral Tribunal," and "Contentious/Advisory Jurisdiction."[3] Article 47 provides, "The *jurisdiction* of the Permanent Court may, within the conditions laid down in the regulation, be extended to disputes [with] non-contracting powers (emphasis added),"[4] which is the institutional jurisdiction of the PCA. In its 2000 through 2011 annual reports, the Administrative Council reported that the *Larsen* tribunal was established "Pursuant to article 47 of the 1907 Convention."[5] Since 2012, the annual reports ceased to include all cases

[1] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, accessed January 17, 2021, https://pca-cpa.org/en/cases/35/.

[2] David Keanu Sai, "Royal Commission of Inquiry," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 24, https://www.hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf.

[3] United Nations Conference on Trade and Development, Dispute Settlement: General Topics—1.3 Permanent Court of Arbitration (2003) at 15-16, accessed January 17, 2021, https://unctad.org/system/files/official-document/edmmisc232add26_en.pdf.

[4] 36 Stat. 2199; Treaty Series 536.

[5] Permanent Court of Arbitration, *Annual Reports*, Annex 2, accessed January 17, 2021, https://pca-cpa.org/en/about/annual-reports/.

conducted under the auspices of the PCA but rather only cases on the docket for that year. The PCA's website, instead, provides access to all past cases through its case repository.[6]

The structure of the Permanent Court of Arbitration comprises "three bodies: (1) a panel of members [who serve as arbitrators]; (2) an International Bureau; and (3) an Administrative Council."[7] The Administrative Council is "composed of the Minister of Foreign Affairs of the Netherlands, as President, and of the diplomatic representatives at The Hague of state parties to the" PCA Convention.[8] According to Article 49 of the 1907 Convention, the Administrative Council "publishes an annual report on the work of the Court, the functioning of its administration services, and on its expenditure."[9] The United States, by its embassy in The Hague, is a member of the Administrative Council and, therefore, publishes the PCA annual reports. These annual reports acknowledge the status of the Hawaiian Kingdom as a non-Contracting Power. This constitutes clear and unequivocal evidence that the United States recognizes the continuity of the Hawaiian Kingdom as a non-Contracting Power to the PCA Convention.

Unlike the United States, which is a Contracting Power to the Convention, the Hawaiian Kingdom is not a signatory to the Convention and, therefore, is a non-Contracting Power. The term non-Contracting Power is synonymous with non-Contracting State. After the PCA verified the continued existence of the Hawaiian State, for the purposes of its institutional jurisdiction, it also simultaneously verified that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "private entity." Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American

[6] Permanent Court of Arbitration, Case Repository, accessed January 17, 2021, https://pca-cpa.org/en/cases/.

[7] Manley O. Hudson, "The Permanent Court of Arbitration," *American Journal of International Law* 27, no. 3 (1933): 442.

[8] *Id.*, 444.

[9] *Id.*

> municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.[10]

If the United States objected to the PCA Administrative Council's annual reports that the Hawaiian Kingdom is a non-Contracting State to the 1907 Convention, it would have filed a declaration with the Dutch Foreign Ministry as it did when it objected to Palestine's accession to the 1907 Convention on 28 December 2015. Palestine was seeking to become a Contracting State to the 1907 Convention and submitted its accession to the Dutch government on 30 October 2015. In its declaration, which the Dutch Foreign Ministry translated into French, the United States explicitly stated, inter alia, "the government of the United States considers that 'the State of Palestine' does not answer to the definition of a sovereign State and does not recognize it as such (translation)."[11] The State of Palestine is a new State, whereas the Hawaiian Kingdom is a State in continuity since the nineteenth century. Furthermore, since the United States explicitly recognized the validity of the Hawaiian Kingdom as an independent State in the nineteenth century it is precluded from "contesting its validity at any future time."[12]

For the purposes of international arbitration, a State, as a juridical person, requires a government to speak on its behalf, without which the State is silent and, therefore, there could be no arbitral tribunal to be established by the PCA to resolve an international dispute. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, Talmon articulates the relationship between the State and its government:

> From the fact that States are juridical persons it follows that they must act through organs. In the words of the Permanent Court of International Justice, "States can act only by and through their agents and representatives." It is generally agreed that the organ representing the State in international intercourse is its government. But, as Professor Bin Cheng has rightly pointed out, "States not only act through their government but through their government exclusively." The government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. It is submitted that

[10] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, accessed January 17, 2021, https://pca-cpa.org/en/cases/35/.

[11] Ministry of Foreign Affairs of the Kingdom of the Netherlands, *Notification of the Declaration of the United States translated into French* (January 29, 2016) (online at https://repository.overheid.nl/frbr/vd/003316/1/pdf/003316_Notificaties_11.pdf).

[12] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *Am. J. Int'l L.* 308, 316 (1957).

> this is the case irrespective of whether the government is *in situ* or in exile.[13]

The PCA Administrative Council's annual reports from 2000-2011 clearly acknowledges the continued existence of the Hawaiian Kingdom as a non-Contracting State to the 1907 Convention. Along with the United States, the other Contracting States with the Hawaiian Kingdom in its treaties that are also members of the PCA Administrative Council, include Austria,[14] Belgium,[15] Denmark,[16] France,[17] Germany,[18] Great Britain,[19] Hungary,[20] Italy,[21] Japan,[22] Luxembourg,[23] Netherlands, Norway,[24] Portugal,[25]

[13] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford, Clarendon Press, 1998), 115.

[14] Embassy of Austria, whose address is Van Alkemadelaan 342, 2597 AS Den Haag, Netherlands.

[15] Embassy of Belgium, whose address is Johan van Oldenbarneveltlaan 11, 2582 NE Den Haag, Netherlands.

[16] Embassy of Denmark, whose address is Koninginnegracht 30, 2514 AB Den Haag, Netherlands.

[17] Embassy of France, whose address is Anna Paulownastraat 76, 2518 BJ Den Haag, Netherlands.

[18] Embassy of Germany, whose address is Groot Hertoginnelaan 18-20, 2517 EG Den Haag, Netherlands.

[19] Embassy of Great Britain, whose address is Lange Voorhout 10, 2514 ED Den Haag, Netherlands.

[20] Embassy of Hungary, whose address is Hogeweg 14, 2585 JD Den Haag, Netherlands.

[21] Embassy of Italy, whose address is Parkstraat 28, 2514 JK Den Haag, Netherlands.

[22] Embassy of Japan, whose address is Tobias Asserlaan 5, 2517 KC Den Haag, Netherlands.

[23] Embassy of Luxembourg, whose address is Nassaulaan 8, 2514 JS Den Haag, Netherlands.

[24] Embassy of Norway, whose address is Eisenhowerlaan 77J, 2517 KK Den Haag, Netherlands.

[25] Embassy of Portugal, whose address is Zeestraat 74, 2518 AD Den Haag, Netherlands.

Russia,[26] Spain,[27] Sweden,[28] and Switzerland.[29] Their acknowledgment of the continuity of the Hawaiian State also acknowledges the full force and effect of their treaties with the Hawaiian Kingdom except where the law of occupation supersedes them.[30] Neither the Hawaiian Kingdom nor its treaty partners provided notice to the other of its intention to terminate the treaties in accordance with the treaty provisions.

In his legal opinion, Federico Lenzerini, professor of international law, provided the legal basis, under both Hawaiian Kingdom law and the rules of international law, for concluding that the Council of Regency "has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level."[31]

As an Italian scholar of international law, Lenzerini's legal opinion is a source of the rules of international law—unlike those within the jurisprudence of the United States. The latter form of legal opinions are limited to an "understanding of the law as applied to the assumed facts."[32] They are not regarded as a source of United States law, which include the United States constitution, State constitutions, Federal and State statutes, common law, case law, and administrative law. These types of legal opinions have persuasive qualities, but they are not a source of law.

Unlike the jurisprudence within States, there is "no 'world government' [and] no central legislature with general law-making authority" on the

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[26] Embassy of Russia, whose address is Andries Bickerweg 2, 2517 JP Den Haag, Netherlands.

[27] Embassy of Spain, whose address is Lange Voorhout 50, 2514 EG Den Haag, Netherlands.

[28] Embassy of Sweden, whose address is Johan de Wittlaan 7, 2517 JR Den Haag, Netherlands.

[29] Embassy of Switzerland, whose address is Lange Voorhout 42, 2514 EE Den Haag, Netherlands.

[30] For treaties of the Hawaiian Kingdom with Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland see "Treaties with Foreign States," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020), https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf.

[31] Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* (May 24, 2020), para. 9, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/Legal_Opinion_Re_Authority_of_Regency_Lenzerini.pdf.

[32] *Black's Law Dictionary*, 6th ed., (St. Paul, Minn, West Publishing Co., 1990), 896.

international plane.[33] International law, however, is an essential component in the international system, which "has the character and qualities of law, and serves the functions and purposes of law, providing restraints against arbitrary state action and guidance in international relations."[34] According to Article 38(1) of the Statute of the International Court of Justice, sources of international law comprise of:

> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) …judicial decisions and the *teachings of the most highly qualified publicists of the various nations for the determination of rules of law* (emphasis added).

The American Law Institute also concludes that when "determining whether a rule has become international law, substantial weight is accorded to…the writings of scholars."[35] This is highlighted in the seminal case *The Paquete Habana*, where the U.S. Supreme Court concluded that the writing of scholars, in consideration of "whether a rule has become international law" or not, are not prescriptive but rather descriptive "of what the law really is."[36]

If Hawai'i was indeed lawfully incorporated into the United States as the so-called 50th State of the American Union, the PCA would have denied access because Hawai'i would not have been considered a "non-contracting power" under the Convention. The United States, as a Federal State, is a "contracting power" to the Convention and not its constituent States beneath it. These constituent States of the United States are not independent States under international law.

In light of the *Larsen* case, the University of Hawai'i, as a higher learning institution within the Hawaiian State itself, has not provided critical scholarship that would engage and/or develop this dialogue taking place on the international plane. Instead, it has promoted the false narrative that Hawai'i had undergone colonization, and that the aboriginal Hawaiian population is an indigenous people not unlike Native American tribes that reside within the State of the United States. The author served as the first President of HSLP and led the formation of the *Hawaiian Journal of Law*

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[33] American Law Institute*, Restatement of the Law (Third)—The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1987), 17.

[34] *Id*.

[35] American Law Institute, §103(2)(c).

[36] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

*and Politics* (HJLP) in 2004. Legal publisher, *Heinonline*, provides access to two editions of the journal that were published in 2004 and 2006.

In this article, I will address the failure of the University of Hawai‘i at Mānoa, since the formation of HSLP in 2003, to critically engage this important subject of research and the continued effort of peddling false narratives that have already been rebuked by the research of HSLP alumni. Many of the alumni currently hold doctoral and master's degrees and have publications of their research but have been intentionally blocked from holding tenure track positions at the University of Hawai‘i at Mānoa because their research runs contrary to the objectives sought by what I call the Hawaiian indigeneity movement. As it stands, the research of the HSLP is being deliberately marginalized by faculty members at the University of Hawai‘i at Mānoa in their effort to maintain a falsified discourse of Hawaiian indigeneity.

On this subject, and in contravention of conventional scholarship, I will depart from the impartiality with which all my previous writings have been produced. I am not only a political scientist, but an aboriginal Hawaiian subject whose great grandparents were born in the Hawaiian Kingdom before the country was invaded by the United States in 1893, which has led to the prolonged belligerent occupation to date. This subject is a personal issue for me as, while I was serving as the commander of Charlie Battery, 1st Battalion 487th Field Artillery, Hawai‘i Army National Guard in the 1990s, I was rudely awakened to the truth of what happened to a country I never knew.

The opinions expressed in this article are mine and do not reflect the *Hawaiian Society of Law and Politics* or the editorial staff of the *Hawaiian Journal of Law and Politics*. I not only approach this topic as a political scientist but also as a Hawaiian subject who, like the *Hawaiian Patriotic League* before me, firmly believes in the rule of law and not the politics of power.

## II. THE AWAKENING

Although I attended and graduated in 1982 from the Kamehameha Schools, a private High School for aboriginal Hawaiians that was established in the nineteenth century, I was not aware of the circumstances of the overthrow of the Hawaiian government and the profound impact it would have on me as an army officer and a revived Hawaiian subject in making decisions that would have a profound impact and effect on myself and family.[37] It wasn't until I began to research my family's genealogy in

[37] After graduating from the Kamehameha Schools, I attended New Mexico Military Institute where I was commissioned as a Second Lieutenant in the Army's Early Commissioning Program in 1984. That same year, after returning home, I began to fulfill my Army contract of service with the 1/487FA, Hawai‘i Army National Guard. I was honorably discharged in 1994 as a Captain after ten years of service. In 1997, I began to

1992 that I came to realize that what happened when the United States invaded the Hawaiian Kingdom in 1893 was eerily similar to what happened when Iraq invaded Kuwait in 1990. I was in Fort Sill, Oklahoma, at that time attending Field Artillery Officers Advanced Course and getting live intelligence reports of the overthrow of the Kuwaiti government and Iraq's subsequent occupation. The parallels were remarkable. In both instances, it was their governments that were overthrown by military force and not their countries. And the unilateral annexation schemes of both countries were unlawful and of no effect under international law. Where Iraq's occupation of Kuwait lasted just over 7 months, the American occupation continues for over a century.

This reawakening instilled in me a Hawaiian national sense of awareness and patriotism I did not previously have, and it set me on a course that I remain committed to despite the unwarranted visceral attacks against my person and reputation. I do understand, however, that personal attacks come with the territory, so to speak, when revealing an uncomfortable truth, but these attacks do constitute libel, which is a crime under Hawaiian Kingdom law. Because the Hawaiian Kingdom continues to exist, so do its laws.

In 1995, I was a partner of Perfect Title Company (PTC), formed as a general partnership under Hawaiian Kingdom law, that exposed the fact that all land titles in Hawai'i were defective because, as a result of the illegal overthrow of the government, no one could get a valid notary public to acknowledge any transfer of property after January 17, 1893, which included mortgages. The so-called notaries after 1893 were insurgents and not government officials as concluded by President Grover Cleveland after investigating the overthrow of the Hawaiian government.[38]

This exposure by PTC rattled the title insurance industry because if there is a defect in title, which renders the mortgage instrument void, title insurance covers the remaining debt owed to the lender.[39] According to ALTA's lender's policy of title insurance, a title insurance company insures "against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of: …A defect in the Title caused by…a document affecting Title not properly…sealed, acknowledged [or] notarized."

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serve my country as an officer of the restored Hawaiian government, by virtue of a Regency, that represented the Hawaiian Kingdom at the Permanent Court of Arbitration. For the formation of the Council of Regency, see Sai, "Royal Commission of Inquiry," 18-23.

[38] David Keanu Sai, "Preliminary Report—Legal Status of Land Titles throughout the Realm," *Royal Commission of Inquiry*, July 16, 2020, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf.

[39] David Keanu Sai, "Supplemental Report—On Title Insurance," *Royal Commission of Inquiry*, October 28, 2020, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/RCI_Supp_Report_Title_Insurance.pdf.

I began to realize that many people did not know what title insurance was even though they were required by the lender to purchase the policy for the lender's protection should there be a defect in title. Without a valid mortgage, the lender would be incapable of foreclosure in order to collect the remaining debt owed. The borrower's purchase of a lender's policy of title insurance, with a one-time premium, was a condition of the loan. In 1997, it was reported by the media that, "Perfect Title has created chaos in Hawaii's real estate industry with its claim that current land titles are no good. The company reaches those conclusions using 19th century Hawaiian Kingdom law, which it says is still in effect, and by searching property records dating to the 1840s."[40]

Unable to refute PTC's title reports, this ominous threat led the title insurance industry, represented by John Jubinsky, attorney for Title Guaranty of Hawai'i, to shift attention away from title insurance to spreading, through an aligned and biased media, that PTC was advising elderly people to not make their mortgaged loan payments. A claim that was patently false. What was at the core of this issue was title insurance, not mortgage payments, as revealed in a report by the *Star-Bulletin* in 1997.

> [Perfect Title's] report came to light when [a] 5.8-acre parcel was put up for sale at an auction last year. Title Guaranty refused to issue a policy to the would-be buyer because of the cloud created by the report. Such insurance protects the interests of a lender or property owner if a defect is discovered in the title. The agency won't provide insurance until Perfect Title's report is expunged or dealt with through the courts, Jubinsky said.
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> "What's everybody afraid of ?" countered David Keanu Sai, a partner of Perfect Title owner Donald Lewis. "These are just reports." All the industry has to do to solve the problem is prove the title searches are wrong—something that can't be done because they're based on fact, Sai said. "If we're such a scam like everyone says, why doesn't (Title Guaranty) just issue the insurance" and ignore the reports.[41]

On September 5, 1997, the office of PTC was raided by the Honolulu Police Department's white collar crime unit. The *Star-Bulletin* reported, "As part of a state criminal investigation, Honolulu Police yesterday morning arrested Donald A. Lewis, David Keanu Sai, and a company secretary for investigation of theft, racketeering and tax evasion."[42] These

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[40] Rob Perez, "Perfect Title focus of criminal probe," *Star-Bulletin*, July 17, 1997, accessed January 17, 2021, http://archives.starbulletin.com/97/07/17/news/story1.html.

[41] Rob Perez, "Title claims block isle land deals," *Star-Bulletin*, January 8, 1997, accessed January 17, 2021, http://archives.starbulletin.com/97/01/08/business/index.html.

[42] Rob Perez, "Judge bars firm's filing of title search," *Star-Bulletin*, September 6, 1997.

outlandish accusations of "theft, racketeering and tax evasion" emboldened the smear campaign that led to my so-called indictment, criminal trial and conviction of the frivolous charge of a class-B felony of attempted theft of a home.

Through sheer force and propaganda, the title insurance industry and the State of Hawai'i managed to temporarily shift public attention away from PTC's title reports and title insurance by vilifying the messengers. If PTC's title reports were frivolous, as claimed by the title industry without any countering evidence, why did the State of Hawai'i attack with such vengeance? Simple answer is that PTC was an existential threat to the State of Hawai'i and the economy for speaking the truth. "When a well-packaged web of lies has been sold gradually to the masses over generations," wrote Dresden James, "the truth will seem utterly preposterous and its speaker a raving lunatic."

Under international law, however, these actions constitute the war crimes of unlawful confinement, denying a protected person a fair and regular trial and pillaging. War crimes have no statute of limitions, which means a person can be prosecuted more than 50 years after committing the war crime itself. William Schabas, a renowned scholar in international criminal law who authored a legal opinion concerning war crimes committed in the Hawaiian Kingdom last year, reveals the United States position on war crimes during the First Gulf War:

> In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that 'under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.' [43]

As a former officer, the army taught me well to have a thick skin and to remain vigilant and mission oriented. My mission in the academy after returning from the PCA in December of 2000 was to not only expose the prolonged occupation of the country, through analytical research, in order to bring compliance with international humanitarian law, but to directly engage the campaign of disinformation that resulted from over a century of *Americanization*.[44]

As a country that has endured the devastating effects of denationalization through *Americanization* for over a century, it has, nevertheless, revealed to me the significance and the power of education, which, in this case, was weaponized by the insurgents in order to obliterate the national

[43] *Id*., 155.

[44] Sai, "Royal Commission of Inquiry," 28-35.

consciousness of the Hawaiian Kingdom in the minds of young Hawaiian subjects who were attending schools that postdate the 1893 invasion, which includes my grandparents, parents and myself. This institutionalized indoctrination has ironically spun off and created another instance of weaponizing education that is currently being deployed, whether by chance or design, by the Hawaiian indigeneity movement that seeks to obliterate, like the insurgents before them, the polity of the Hawaiian Kingdom.

This targeting of the polity is evidenced by Merry, who stated "the relationship between Euro-Americans and Native Hawaiians was a classical colonial relationship [that sought] to transform the society of the indigenous people and subsequently wrested political control from them."[45] Osorio concluded the Hawaiian Kingdom "never empowered the Natives to materially improve their lives, to protect or extend their cultural values, nor even, in the end, to protect that government from being discarded," because the system itself was foreign and not Hawaiian.[46] Stauffer writes, "the government that was overthrown in 1893 had, for much of its fifty-year history, been little more than a de facto unincorporated territory of the United States...[and] the kingdom's government was often American-dominated if not American-run."[47] And Silva concluded that the overthrow "was the culmination of seventy years of U.S. missionary presence."[48] These conclusions have no basis in historical facts and relevant laws.

The tipping point for me to write this critical article was when I was invited by the editor-in-chief of the *Law and History Review* this past summer to serve as one of the referees for a manuscript that was submitted to be considered for publication. The manuscript focused on a so-called criminal trial in 1894 for treason instituted by the insurgents calling themselves the Republic of Hawai'i, and two civil cases in 1939 regarding adoptions in the so-called Territory of Hawai'i. The crux of the argument was that aboriginal Hawaiians would have been treated fairly by the courts if they were a federally recognized Indian tribe. To my dismay, the manuscript was saturated with Hawaiian indigeneity.

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[45] Sally Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, University Press, 2000), 127.

[46] Jonathan Osorio, *Dismembering Lāhui: A History of the Hawaiian Nation to 1887* (Honolulu, University of Hawai'i Press, 2002), 257.

[47] Robert Stauffer, *Kahana: How the Land Was Lost* (Honolulu, University of Hawai'i Press, 2004), 73.

[48] Noenoe K. Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Durham and London, Duke University Press, 2004), 202.

## III. JUXTAPOSING THE COLONIAL BENT WITH HAWAIIAN STATEHOOD

In her book *From a Native Daughter*, Trask reveals the decision made for Hawaiians, not by Hawaiians, to walk down what I call the slippery path of indigeneity given that the Hawaiian Kingdom was and continues to be an independent State. She explains, "some of us in the Hawaiian nationalist community believe the…United Nations Declaration on the Rights of Indigenous Peoples should become part of the framework within which future analyses, including legal discussions, regarding our special status should occur in Hawai'i and in the United States."[49] This ushered in scholarship to be imbued with an indigenous rights discourse that applies critical race theory, colonial theory and indigeneity.

The term colony, colonial or colonization is pervasively mentioned with common citations to Merry's *Colonizing Hawai'i: The Cultural Power of Law* (2000), Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (2004), and Kauanui's *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity* (2008). American empire, with colonial underpinnings, is the framework. These writers, however, do not qualify the use of these terms in relation to Hawai'i but merely disguise their rhetoric with scholarship—the collegiate art of convincing.

In *A Nation Rising*, Goodyear-Ka'ōpua analogizes belligerent occupation to "assault and battery in a court of law," but justifies the use of colonial theory to "describe, heal from, and analyze the manifold repercussions of that beating."[50] She rejects "that prolonged occupation and colonization are two mutually exclusive statuses under international law."[51] Her failure, however, to provide any critical analysis of the two statuses within the framework of international law reveals her inability to do so because, although she is a professor in the political science department at the University of Hawai'i at Mānoa, she has no formal training as a political scientist. She was hired as faculty in the *Indigenous Politics* program.[52] Her Ph.D., like Kauanui, is in *History of Consciousnes*s from UC Santa Cruz and not international relations and law, which is my area of expertise as a political scientist. Other political scientists who also specialized in this area of scholarship, and are internationally renowned scholars, include Quincy Wright, author of *The Enforcement of International Law Through*

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[49] Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Honolulu, University of Hawai'i Press, 1999), 32.

[50] Noelani Goodyear-Ka'opua, "Introduction," in Noelani Goodyear-Ka'opua, Ikaika Hussey, and Erin Kahunawaika'ala Write (eds.), *A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty* (Durham and London, Duke University Press, 2014), 19.

[51] *Id*.

[52] University of Hawai'i at Mānoa, *Department of Political Science, Indigenous Politics*, accessed January 17, 2021, accessed January 17, 2021, https://politicalscience.manoa.hawaii.edu/indigenous-politics/.

*Municipal Law in the United States*,[53] and Gehard von Glahn, author of *Law Among Nations: An Introduction to Public International Law*.[54]

Goodyear-Kaʻōpua instead peddles an essay written by a graduate of the University of Hawaiʻi William S. Richardson School of Law, Julian Aguon, titled *The Commerce of Recognition: Toward Curing the Harm of the United States' International Wrongful Acts in the Hawaiian Islands*.[55] In a twitter post, Goodyear-Kaʻōpua wrote, "I strongly recommend reading 'The Commerce of Recognition…' a report by renowned international law scholar and practicing attorney [Julian Aguon]."[56] Calling Aguon a "renowned international law scholar" is a grave mistake because he is not, and Kaʻōpua should have known that.

Aguon only has a Juris Doctor (J.D.) degree, which the university refers to as a professional degree. It is not a research degree. Research degrees in the discipline of law include a master's degree called an LL.M., and a Ph.D. degree, which is also called a Doctor of Juridical Science (S.J.D.) degree. More importantly, a Ph.D. or S.J.D. degree in law should not be confused with a J.D. because a J.D. is a degree that prepares individuals to pass the bar exam in order to practice law. If they do not pass the bar exam, the J.D. degree is meaningless because it only prepares the individual to enter the law profession—thus being called a professional degree. The writings of "international law scholars" are regarded as a source of international law. An "international law scholar" Aguon is not.

The term juris doctor was created in the mid-twentieth century to replace what was previously called in the United States an LL.B. or bachelor in laws degree. Furthermore, William S. Richardson School of Law offers graduate research degrees called an LL.M. and a S.J.D. According to its website, "The Doctor of Juridical Science (S.J.D.) is an advanced legal degree with a focus on original research and scholarship under faculty supervision. Successful candidates must produce a work of publishable scholarship that makes a unique contribution to the legal scholarly

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[53] Philip Quincy Wright, *The Enforcement of International Law Through Municipal Law in the United States* (Urbana, Published by the University of Illinois, 1916).

[54] Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 6th ed., (New York, Macmillan Publishing Company, 1992).

[55] Julian Aguon, *The Commerce of Recognition (Buy One Ethos, Get One Free): Toward Curing the Harm of the United States' International Wrongful Acts in the Hawaiian Islands* (Honolulu, Ka Huli Ao Center for Excellence in Native Hawaiian Law, 2012).

[56] On July 29, 2020, Noelani Goodyear-Kaʻōpua tweeted, "I strongly recommend reading 'The Commerce of Recognition: TOWARD CURING THE HARM OF THE UNITED STATES' INTERNATIONAL WRONGFUL ACTS IN THE HAWAIIAN ISLANDS,' a report by renowned international law scholar and practicing attorney, @julian_aguon," accessed January 17, 2021, https://twitter.com/NoeGK/status/1288546738857377794.

literature."[57] As a graduate research degree, the S.J.D. degree is equivalent to a Ph.D. degree in political science where both provide "original research and scholarship." Aguon has neither an LL.M., an S.J.D., nor a Ph.D., and his essay is not "a unique contribution to the legal scholarly literature."

Goodyear-Kaʻōpua attempts to use Aguon to discredit my scholarship and expertise by applying a false equivalency. In a misguided attempt to attack me as a political scientist and scholar, Aguon, the attorney, argues:

> There has been an attempt by some Hawaiian sovereignty theorists to create an impenetrable conceptual binary between the occupation and colonization paradigms. See, e.g., Sai, *The American Occupation*, *supra* note 155, at 180-83. Arguably, no such binary exists. There are numerous examples where the international community has coterminously referred to territories under alien subjugation as being both colonized and occupied. Two such examples are the cases of Western Sahara and East Timor. Although Western Sahara has been formally recognized by the United Nations as a non-self-governing territory, albeit originally as a colony of Spain, the United Nations as a well as the International Court of Justice have also recognized it as being currently occupied by Morocco. Similarly, though East Timor remained on the U.N. list of colonies until its independence in 2002, the international community routinely recognized it as being under military occupation by Indonesia.[58]

If Aguon indeed were a scholar, he would have known that both of these instances concern non-State territories that do not fall within the gamut of international humanitarian law and the law of occupation—also called the law of armed conflict that applies between existing States. According to Schindler, "the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other...Any kind of use of arms between two States brings the Conventions into effect."[59] Casey-Maslen further concludes that an inter-State armed conflict "also exists whenever one state uses any form of armed force against another state, irrespective of whether the latter state fights back."[60]

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[57] University of Hawai'i at Mānoa William S. Richardson School of Law, *Which Program Is Right for You?*, accessed January 17, 2021, https://www.law.hawaii.edu/international-programs-0.

[58] Aguon, n. 279, 34.

[59] Dietrich Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols," *Recueil des cours, Hague Academy of International Law* (1979): 131.

[60] Stuart Casey-Maslen, "Armed conflicts in 2012 and their impacts," in *The War Report 2012*, ed. Stuart Casey-Maslen (Oxford, Oxford University Press, 2013), 7.

Occupation of non-State territory falls under the doctrine of discovery and effective control whether by military force or by the settlement of the citizenry of the colonizing State, whereas the effective control during the belligerent occupation of State territory by another State triggers the law of occupation where the occupying State is obliged to administer the laws of the occupied State because its sovereignty and laws remain intact despite the military overthrow of its government. Therefore, there is a distinct difference between the military occupation of non-State territory and the belligerent occupation of State territory.

In the case of Indonesia's military occupation of East Timor that lasted from 1975 to 2002, there was no requirement for Indonesia to administer East Timorese law because East Timor, a Portuguese colony, did not have its own law until 2002 when it became an independent and sovereign State. Should Indonesia occupy East Timor today, then international law would require Indonesia, as the occupying State, to administer the laws of East Timor, being the occupied State. The same would apply to Western Sahara should it become an independent State, which is not the case at the moment. For Aguon to have conflated the two regimes of international law is an amateur mistake.

In her essay, *Traversing the Hawaiian Nationalist Political Gulf*, Kauanui "offers some thoughts on how those of us committed to the exercise of Hawaiian self-determination can bridge the seeming divide between de-occupation and decolonization without compromising [Kānaka Maoli] national claims under international law."[61] She explains that the "crux of the debate here is based on the notion that occupation and colonialism are mutually exclusive, regardless of their basis in law, as [Kānaka Maoli] draw attention to [their] national claim within the US Empire."[62] She then proposes "an alternative concept of settler colonialism, while drawing on normative frameworks of international law."[63]

As a scholar with no training in political science, particularly in international relations and law, her attempt to draw on normative regimes of international law is not persuasive, to say the least. As Denzinger explains, political science is a "set of techniques, concepts, and approaches whose objective is to increase the clarity and accuracy of our understandings about the political world."[64] In fact, Kauanui does not

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[61] J. Kēhaulani Kauanui, "Traversing the Hawaiian Nationalist Political Gulf," *Hulili: Multidisciplinary Research on Hawaiian Well-Being* 10 (2016): 83.

[62] *Id*., 85.

[63] *Id*.

[64] James N. Danzinger, *Understanding the Political World: Comparative Introduction to Political Science*, 7th ed. (New York – San Francisco – Boston – London – Toronto – Sydney – Tokyo – Singapore – Madrid - Mexico City – Munich – Paris – Cape Town – Hong Kong – Montreal, Pearson Longman, 2004), 6.

examine any normative framework of international law except for mentioning the Hague and Geneva Conventions and its application to occupied territories in one paragraph. She also fails to explain that these treaties only apply between States, although the 1977 Additional Protocols to the Geneva Conventions extended its application to non-international armed conflicts, which are armed conflicts within a State called internal armed conflicts such as liberation movements.

Furthermore, Kauanui's concept of "settler colonialism," according to the Fourth Geneva Convention, is the war crime of unlawful transfer of populations to the occupied territory. Article 49 of the Convention provides, "The Occupying Power shall not…transfer parts of its own civilian population into the territory it occupies."[65] As stated by Schabas regarding the Hawaiian Kingdom, "the Occupying Power must not change the demographic, social and political situation in the territory it has occupied to the social and economic detriment of the population living in the occupied territory."[66] Kauanui fails to make this connection.

What Kauanui completely omits in her essay is the definition of international law, which "is the law of the international community of states."[67] Conceptually, it consists of "specific norms and standards, and largely in practice, international law functions between states, as represented by their governments."[68] More importantly, she overlooks the principle of sovereign equality among States and the integrity of the State's legal order, called independence, over its territory. According to Huber, the sole arbitrator in the seminal *Palmas* case, "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[69] Independence in international law is not a physical attribute of being separate, but rather a political term with legal consequences. As such, international law preserves the sovereignty and independence of a State even during a belligerent occupation after the occupied State's government was militarily overthrown. As Brownlie explains:

> Thus after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of

[65] 6.3 U.S.T. 3516, 3548 (1955).

[66] Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," 167.

[67] American Law Institute, 16.

[68] *Id*.

[69] *Island of Palmas Case* (Netherlands/U.S.A.), R.I.A.A., vol. II, 829, 838 (1928).

> necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[70]

The principle of self-determination under international law also applies differently over the national population of an existing State, the indigenous population within a State, and the population of people residing within a non-self-governing territory, a colonial situation. It appears that Kauanui does not know or understand how the principle and the corresponding right of a people to self-determination applies differently in these situations.

Regarding the citizenry of an established State, Article 1(2) of the United Nations Charter provides that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination." Article 1 of both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

This type of self-determination is internal, not external, where the national population of the State shall "choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves."[71] And only when the national population of an existing State "are afforded these rights can it be said that the whole people enjoys the right of internal self-determination."[72] As the officers of the *Hawaiian Patriotic League* stated in a petition to President Cleveland on December 27, 1893, the Hawaiian nation, "for the past sixty years, had enjoyed free and happy constitutional self-government."[73] This means that Hawaiian subjects were enjoying, what is understood today in international law, "the right of internal self-determination" up to the American invasion and subsequent overthrow of their government on January 17, 1893.

When a State comes under the belligerent occupation by another State after its government has been overthrown, the national population of the occupied State is temporarily prevented from exercising its civil and political rights it previously enjoyed prior to the occupation. Therefore, as Craven points out, "the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a

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[70] Ian Brownlie, *Principles of Public International Law*, 4th ed., (Oxford, Clarendon Press, 1990), 109.

[71] Antonio Cassese, *Self-determination of peoples* (Cambridge, University Press, 1995), 53.

[72] *Id*.

[73] *See infra*, note 154.

right would entail, at the first instance, the removal of all attributes of foreign occupation, and restoration of the sovereign rights of the dispossessed government."[74]

When it comes to the application of the right of self-determination to indigenous peoples, it is still internal self-determination, but it applies within the State that indigenous populations reside in, *i.e.* the Cherokee Nation within the United States. This is because indigenous populations are not States under international law but rather tribal nations of people that reside within the territory of the State itself. Kauanui misapplies this type of the right of internal self-determination to aboriginal Hawaiians as if they are a tribe within the United States. Just as Tongan nationals do not constitute a tribal nation within their own Tongan State, Hawaiian nationals do not constitute a tribal nation within their own Hawaiian State. The Kingdom of Tonga achieved its independence on June 4, 1970 and the Hawaiian Kingdom achieved its independence on November 28, 1843.

The third application of the right of self-determination applies to people that reside within territory that is considered non-self-governing and comes under the colonial or administering power of a State, *i.e.*, the Sahrawi people of Western Sahara and the colonial power of Morocco. In this instance, the right of self-determination is external, not internal, and is guided by the United Nations resolution 1514 called decolonization.[75] As a dependent people who have not exercised their right of external self-determination, resolution 1514 provides:

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.[76]

U.N. resolution 1514 only applies to non-self-governing territories that have not achieved independence, or in other words were never an independent State. This resolution does not apply to the citizenry of existing States or to indigenous peoples. The legal personality of a non-State territory is distinct from an independent State as stated in the 1975 Friendly Relations Declaration, which provides:

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[74] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 126.

[75] GA Resolution 1514 (Dec. 14, 1960), *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

[76] *Id*., section 5.

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.[77]

Aguon's reference to East Timor and Western Sahara come under this type of the right of external self-determination. Where East Timor exercised its right of self-determination and chose to be an independent State in 2002, the Sahrawi people of Western Sahara retain that right but have not been able to exercise this type of right, through a United Nations referendum, due to the colonial power of Morocco that opposes it.

The Hawaiian Kingdom, as an independent State, did not lose its independence and become non-self-governing as a result of the United States illegal overthrow of its government and the ensuing occupation, just as the German and Japanese States did not lose their independence and became non-self-governing when their governments were destroyed by the Allied Powers that brought the hostilities of the Second World War to an end. Furthermore, Germany and Japan were not de-colonized when the Allied Powers ended their occupation of both their territories in the mid-1950s. These States were de-occupied according to the rules of international law, which apply with equal force to the Hawaiian Kingdom.

Furthermore, U.N. resolution 1514 does not apply to the Hawaiian situation despite the United States deliberate attempt to conceal its prolonged occupation by reporting Hawai'i as a non-self-governing territory in 1946 under Article 73(e).[78] The United States did not report Japan as a non-self-governing territory when it occupied Japanese territory from 1945 until 1952. Therefore, the 1959 U.N. resolution 1469 (XIV) that stated the General Assembly "*Expresses* the opinion, based on its examination of the documentation and the explanations provided, that the people of…Hawaii have effectively exercised their right to self-determination and have freely chosen their present status" as the State of Hawai'i, is an opinion and non-binding.[79]

According to Article 13 of the U.N. Charter, the "General Assembly shall initiate studies and make recommendations for the purpose of…promoting international co-operation in the political field and encouraging the

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[77] GA Resolution 26/25 (XXV) (Oct. 24, 1970), *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.*

[78] David Keanu Sai, "A Slippery Path Towards Hawaiian Indigeneity," *Journal of Law and Social Challenges* 10 (2008): 102-104.

[79] GA Resolution 1416 (XIV) (Dec. 12, 1959), *Cessation of the transmission of information under Article 73 e of the Charter in respect of Alaska and Hawaii*.

progressive development of international law and its codification." U.N. resolutions are not a source of international law but are merely recommendations that cannot impede or alter the obligations of the United States under the law of occupation. As Crawford states, "Of course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States."[80]

To say there is no difference between de-occupation and de-colonization is analogous to saying, in this case, there is no difference between the process of ending a kidnapping and the process of annulling coerced adoption papers. There is no bridge between de-occupation and de-colonization as I explain in this article, and these concepts are mutually exclusive in international law. Kauanui's essay falls from the start.

According to Black's Law dictionary, a colony is a territory "attached to another nation, known as the mother country [independent State], with political and economic ties; e.g. possessions or dependencies of the British Crown (e.g. thirteen original colonies of United States)."[81] Therefore, a colony is not a State, but rather an extension of a State. So, in order for the Hawaiian Kingdom to have been colonized by the United States it could not have been an independent State of its own at the time of so-called colonization.

Great Britain and France explicitly and formally recognized Hawaiian independence on November 28, 1843 by joint proclamation at the Court of London, and the United States followed on July 6, 1844 by letter of Secretary of State John C. Calhoun, on behalf of President John Tyler. The significance of Hawaiian statehood is that it would prevent colonization of Hawaiian territory by any other State, including the United States, because of Hawaiian independence and its exclusive authority over its territory. Furthermore, the arbitral tribunal, in *Larsen v. Hawaiian Kingdom,* in 2001 stated "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[82] According to Ian Brownlie:

> [T]he dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states…defined by law. The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima

[80] James Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford, Clarendon Press, 2007), 113.

[81] *Black's Law,* 265.

[82] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).

> facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.[83]

As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements. Along with the United States on December 20, 1849, the Hawaiian Kingdom also entered into treaties of amity and friendship with Austria-Hungary on June 18, 1875; Belgium on October 4, 1862; Bremen (succeeded by Germany) on March 27, 1854; Denmark on October 19, 1846; France on September 8, 1858; Germany on March 25, 1879; Hamburg (succeeded by Germany) on January 8, 1848; Italy on July 22, 1863; Japan on August 19, 1871; the Netherlands on October 16, 1862; Portugal on May 5, 1882; Russia on June 19, 1869; Spain on October 9, 1863; Sweden-Norway on April 5, 1855; Switzerland on July 20, 1864; and Great Britain on March 26, 1846.[84] And according to Westlake, in 1894, the *Family of Nations* comprised, "First, all European States.… Secondly, all American States.… Thirdly, a few Christian States in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State."[85]

In 1861, the Minister of Foreign Affairs, Robert Wyllie, dispatched a *Synopsis of Right Inherent in the Hawaiian Kingdom, as a Sovereign and Independent State* to the foreign diplomatic and consular agents residing in the Hawaiian Islands. It read:

> 1. The right of the Sovereign to govern His Kingdom, independent of all Foreign influence or control whatever.
> 2. The right of exclusive jurisdiction within the whole extent of His domain, territorial and maritime.
> 3. The right to enforce respect and obedience to His Constitution and laws, upon all who reside within His jurisdiction; to amend His Constitution as provided for in

[83] Brownlie, 287.

[84] See also David Keanu Sai, "Treaties with Foreign States," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 237-310. See also Hawaiian Kingdom treaties, accessed January 17, 2021, https://hawaiiankingdom.org/treaties.shtml.

[85] John Westlake, *Chapters on the Principles of International Law* (Cambridge, University Press, 1894), 81. In 1893, there were 44 other independent and sovereign States in the *Family of Nations*: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Hawaiian Kingdom, Haiti, Honduras, Italy, Liberia, Liechtenstein, Luxembourg, Netherlands, Mexico, Monaco, Montenegro, Nicaragua, Orange Free State that was later annexed by Great Britain in 1900, Paraguay, Peru, Portugal, Romania, Russia, San Domingo, San Salvador, Serbia, Spain, Sweden-Norway, Switzerland, Turkey, United States of America, Uruguay, and Venezuela.

the instrument itself, and to amend, alter, or abrogate His laws according to the Constitution, as He may think necessary for the good of His people.

4. The right to preserve the perfectly free, uncontrolled and independent exercise of the Powers of the State, namely, the Executive, Legislative and Judicial.
5. The right to appoint and dismiss His own Ministers and other officers, agreeably to His Constitution and laws.
6. The rights of Peace, War and Neutrality, to the same extent as exercised by the Sovereign of any other independent State, and to exercise all the powers conferred upon Him by His Constitution and laws.
7. The right to form Treaties, Alliances and Conventions with foreign States, to Diplomatic Representation at foreign Courts, and to form and direct his own foreign policy towards all foreign nations, for the peace, safety and best interests of His Kingdom, as freely as any other Sovereign can exercise that right.
8. The right to form and regulate the internal policy of His Kingdom, in everything relating to the education, religion, morality, industry and commerce of His people; to taxation, assessment, duties on imports and exports for the support of His Government, of national colleges and schools, hospitals, and other charitable institutions; to establish municipalities and corporations, organize and regulate the Police, grant patents and exclusive privileges, and to do all other things for the good of the State and the perfection of His people, according to his own understanding of their interests, without any other *let* or *hindrance* than His own Constitution and Laws, and the provisions of His Treaties with foreign nations, *liberally* construed.
9. The right of reference to a friendly Sovereign, as arbitrator, of all international questions, before foreign nations resort to Reprisals or war, secured by the Protocols of Paris, to all nations, adopting the principles agreed upon by the Representatives of the great Powers in Protocol No. 23, of 16 April, 1856.
10. The right to regulate the etiquette and ceremonial of His own Court, and to be addressed by foreign Agents with the same courtesy and respect with which they would address their own sovereigns.
11. The right to dismiss, or otherwise punish foreign Agents who forfeit their inviolability by abusing their privileges, to the injury of individuals entitled to His Majesty's protection, to the injury of the King and His Government, and the endangerment of the peace and safety of the State, as freely as other Sovereigns would exercise that power, under like circumstances.
12. Finally, all the rights, powers, privileges, immunities, respects and considerations, in all things whatsoever allowed by the Law of Nations and the usage of Courts, to

> other independent Sovereigns and claimed and exercised by them.[86]

The Hawaiian Kingdom was never a colonial possession of the United States and to say otherwise is pure fiction. Without a colonial context, aboriginal Hawaiians cannot be an indigenous people within the United States but rather are the majority of the nationals of an occupied State.

## IV. DISCERNING GOVERNMENT FROM THE STATE

International law distinguishes the State, being the subject of international law, from its government, being the subject of the State's municipal law.[87] The United States also recognized this distinction in *Texas v. White*, where the Supreme Court in 1868 stated that "a plain distinction is made between a State and the government of a State."[88] In *White*, the Court had to deal with the continued existence of Texas as a State of the Federal Union, despite the fact that its government became an insurgency during the Civil War.

According to Wright, "international law distinguishes between a government and the state it governs."[89] Therefore, in international humanitarian law, the military overthrow of the government of a State by another State's military does not equate to an overthrow of the State itself. Its sovereignty and legal order continue to exist under international law and the occupying State, when it is in effective control of the territory, is obligated to administer the laws of the occupied State. This principle comes under the legal regime of international humanitarian law, which is also called the laws of war.

An example of this principle was the overthrow of Spanish governance in Santiago de Cuba in July of 1898. This overthrow did not transfer sovereignty to the United States but triggered the customary international laws of occupation that were later codified under Article 43 of the 1899 Hague Convention, II, and succeeded under Article 43 of the 1907 Hague Convention, IV, whereby the occupying State has a duty to administer the laws of the occupied State over territory that it is in effective control of. This customary law was the basis for General Orders no. 101 issued by President McKinley to the War Department on July 13, 1898:

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[86] Hawaiian Foreign Ministry, *Synopsis of Rights Inherent in the Hawaiian Kingdom, as a Sovereign and Independent State*, October 31, 1861, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/Synopsis_of_Rights_Hawaiian_State_1861.pdf.

[87] Sai, "Royal Commission of Inquiry," 13-14.

[88] *Texas v. White*, 74 U.S. 700, 721 (1868).

[89] Quincy Wright, "The Status of Germany and the Peace Proclamation," *American Journal of International Law* 46, no. 2, (Apr. 1952): 307.

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. … Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[90]

An armistice was eventually signed by the Spanish Government on August 12, 1898, after its territorial possessions of Philippines, Guam, Puerto Rico and Cuba were under the effective occupation of U.S. troops. This led to a treaty of peace that was signed by representatives of both countries in Paris on December 10, 1898. The United States Senate ratified the treaty on February 6, 1899, and Spain on March 19th. The treaty came into full force and effect on April 11, 1899.[91] It was after April 11th that Spanish title and sovereignty was transferred to the United States and American municipal laws enacted by the Congress replaced Spanish municipal laws that once applied over the territories of Philippines, Guam, and Puerto Rico. Under the treaty, Cuba would become an independent State.

## V. THE HAWAIIAN STATE AND INTERNATIONAL LAW

"Traditional international law was based upon a rigid distinction between the state of peace and the state of war," says Judge Greenwood.[92] "Countries were either in a state of peace or a state of war; there was no intermediate state."[93] On January 16, 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[94] This invasion "upon the soil of

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[90] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

[91] 30 Stat. 1754 (1899), accessed January 17, 2021, https://uniset.ca/fatca/b-es-ust000011-0615.pdf.

[92] Christopher Greenwood, "Scope of Application of Humanitarian Law," in *The Handbook of Humanitarian Law in Armed Conflict,* ed. Dieter Fleck (New York and Oxford, Oxford University Press, 1995), 39.

[93] *Id*.

[94] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* (Washington, Government Printing Press, 1895), 451, accessed January 17, 2021, http://libweb.hawaii.edu/digicoll/annexation/blount.php.

Honolulu [that] was…an act of war,"[95] coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States and not to the insurgents. She proclaimed:

> Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.[96]

President Cleveland initiated a presidential investigation on March 11, 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and to provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on March 29th, where he "directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels."[97] His first report was dated April 6, 1893,[98] and his final report was dated July 17, 1893.[99] On October 18, 1893, Secretary of State Gresham notified the President:

> The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.
>
> The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. …
>
> The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign…

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[95] *Id*.

[96] *Id*., 586.

[97] *Id*., 568.

[98] *Id*., 470.

[99] *Id*., 567.

> Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.[100]

When negotiations began at the U.S. Legation in Honolulu on November 13, 1893, U.S. Minister Albert Willis stated to the Queen the position taken by the President after a full investigation. Willis expressed "the President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."[101] "To this," Willis noted, "she bowed her acknowledgements."[102] Negotiations continued for another month. The illegality of the overthrow was due to the international principle of non-intervention in the internal affairs of another State.

President Cleveland delivered a *manifesto* to the Congress on his investigation into the overthrow of the Hawaiian Government on December 18, 1893.[103] The President concluded that the "military occupation of Honolulu by the United States…was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[104] He also determined "that the provisional government owes its existence to an armed invasion by the United States."[105] Finally, the President admitted that by "an act of war…the Government of a feeble but friendly and confiding people has been overthrown."[106] Referring to the annexation plot of the insurgents, Cleveland concluded "that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods."[107]

Unbeknownst to the President, an agreement of peace was reached on the very same day Cleveland gave his *manifesto* to the Congress. Gresham acknowledged receipt of Willis' dispatch of the agreement dated

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[100] *Id*., 462-463.

[101] *Id*., 1242.

[102] *Id*.

[103] *Manifesto* is defined as a "formal written declaration, promulgated by…the executive authority of a state or nation, proclaiming its reasons and motives for…important international action." *Black's Law*, 963.

[104] United States, *Executive Documents*, 452.

[105] *Id*., 454.

[106] *Id*., 456.

[107] *Id*.

December 20, 1893,[108] in a telegram of January 12, 1894, in which he stated, "Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested."[109] According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents.[110] As a constitutional monarch, however, the agreement required an additional signature of a cabinet minister to make it binding under Hawaiian constitutional law. Article 42 of the 1864 Constitution provides, "No act of the [Monarch] shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible."

It is important to note that the very same insurgents in 1893 were the ones that unlawfully imposed, by coercion, the so-called 1887 Constitution that came to be known as the Bayonet Constitution.[111] By their own proclamation of January 17, 1893, they repealed the so-called constitution when they proclaimed, "The Hawaiian monarchical system of Government is hereby abrogated"[112] in order to seek annexation with the United States as a non-monarchical provisional government.

When the insurgents took control of the Hawaiian government apparatus, they only replaced the Queen, her cabinet and the head of the Hawaiian police force. Everyone in government remained but were forced to sign oaths of allegiance to the insurgency who were under the armed protection of U.S. troops. In other words, the Hawaiian monarchical government apparatus was hijacked by the insurgents. They did not form a new government except in name only. As a constitutional monarchy, this governmental apparatus, of which the Queen was head of state, belonged to Hawaiian subjects. The Bayonet Constitution that precipitated the U.S. invasion was, ironically, removed by the insurgents themselves.

Political wrangling in the Congress, however, blocked President Cleveland from carrying out his obligation of restoration of the Queen. Five years later, at the height of the Spanish-American War, President Cleveland's successor, William McKinley, signed a congressional joint resolution of annexation on July 7, 1898, unilaterally seizing the Hawaiian Islands. The 1893 executive agreement, which is a treaty under

[108] *Id*., 1269.

[109] *Id*., 1283.

[110] Sai, "A Slippery Path," 119-121.

[111] David Keanu Sai, "Hawaiian Constitutional Governance," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 78-83.

[112] United States, *Executive Documents*, 210.

international law that binds successor Presidents, although not carried out on the part of the United States, precludes the unilateral seizure of the Hawaiian Islands because the former President concluded that the United States could not "annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods."

The insurgents were a puppet regime of the United States. The seizure of the Hawaiian Islands was a violation of the international principle of *ex injuria jus non oritur*—a law or right does not arise from injustice, and the very act of annexation is, therefore, void under international law. Under international law, according to Crawford, "An act which is void will, presumably, produce no immediate or direct legal consequences."[113]

From a domestic law standpoint, Senator William Allen clearly stated the limitations of United States laws when the resolution of annexation was being debated on the floor of the Senate on July 4, 1898. Allen stated:

> The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein.[114]

Two years later when the Senate was considering the formation of the so-called territorial government for Hawai'i, Allen reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void."[115] Senator Allen's position was in line with the United States Supreme Court.

In its 1824 decision in *The Apollon*, the Supreme Court concluded that the "laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[116] The Hawaiian Supreme Court also cited *The Apollon* in its 1858 decision, *In re Francis de Flanchet*, where the court stated that the "laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction."[117] Both the *Apollon* and *Flanchet* cases

[113] Crawford, *The Creation of States in International Law*, 2nd ed., 158.

[114] 31 Cong. Rec. 6635 (1898).

[115] 33 Cong. Rec. 2391 (1900).

[116] *The Apollon*, 22 U.S. 362, 370 (1824).

[117] *In Re Francis de Flanchet*, 2 Haw. 96, 108-109 (1858).

addressed the imposition of French municipal laws within the territories of the United States and the Hawaiian Kingdom.

In 1936, the United States Supreme Court reiterated this principle in its decision in *United States v. Curtiss Wright Export Corp.*, where the Court stated:

> Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family.[118]

Likewise, as "a member of the family of nations, the right and power of the [Hawaiian Kingdom] in that field [is] equal to the right and power of the other members of the international community," which included the United States. How then can a congressional joint resolution annex a foreign country that was "a member of the family of nations"? Ninety years later, the Office of Legal Counsel (OLC), U.S. Department of Justice, would have to face this dilemma head on.

In a 1988 legal opinion, the OLC examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored the opinion for Abraham Sofaer, legal advisor to the U.S. Department of State. After covering the limitation of congressional authority, which, in effect, confirmed the statements made by Senator Allen in 1898, the OLC found that it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[119] The OLC cited constitutional scholar Westel Willoughby who stated:

> The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in the Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act…Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted.[120]

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[118] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

[119] Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," *Opinions of the Office of Legal Counsel* 12 (1988): 252.

[120] *Id.*

This OLC's conclusion is a position taken by the Federal government similar to the OLC's position that federal prosecutors cannot charge a sitting president with a crime.[121] It binds the federal government until there is another opinion that would say otherwise. The OLC's position on annexation is consistent with the aforementioned U.S. Supreme Court decisions regarding the limitation of municipal laws.

If it was unclear how Hawai'i was annexed by Congressional legislation, it would be equally unclear how the Congress could create a territorial government under *An Act To provide a government for the Territory of Hawaii* in 1900 within the territory of a foreign State.[122] It would also be unclear how the Congress could rename the Territory of Hawai'i to the State of Hawai'i in 1959 under *An Act To provide for the admission of the State of Hawaii into the Union*.[123] As the Hawaiian court stated in *de Flanchet*, "however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction."

In *The Lotus* case, the Permanent Court of International Justice explained that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[124] According to Judge Crawford, derogation of this principle will not be presumed.[125] Therefore, it is presumed that Congressional legislation, whether by a statute or a joint resolution, has no extraterritorial effect except by a "permissive rule," *e.g.*, consent by the Hawaiian Kingdom government. Only international law, not municipal laws, "governs relations between independent States."[126] A joint resolution is not a treaty and, therefore, nothing was ceded to the United States. The United States could no more annex the Hawaiian Islands by enacting a joint resolution in 1898 than it could annex Canada today by enacting a joint resolution.

[121] Randolph D. Moss, "A Sitting President's Amenability to Indictment and Criminal Prosecution," *Opinions of the Office of Legal Counsel* 24 (2000): 222-260.

[122] 31 Stat. 141 (1900).

[123] 73 Stat. 4 (1959).

[124] *Lotus*, PCIJ, ser. A no. 10 (1927), 18.

[125] Crawford, *The Creation of State in International Law*, 2nd ed., 41.

[126] *Id*.

## VI. THE HAWAIIAN WELFARE STATE IN AN ERA OF GLOBAL IMPERIALISM

The Hawaiian Kingdom was a progressive country when compared to the European States and their successor States on the American continent in the nineteenth century. Its political economy was not based on Adam Smith's capitalism—*Wealth of Nations*, but rather Francis Wayland's approach of a cooperative capitalism. According to Mykkanen, Wayland was interested in "defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members."[127]

Wayland's book *Elements of Political Economy* was the fundamental basis when written in the Hawaiian language and adjusted to apply to Hawaiian society accordingly by William Richards. The book was titled *No Ke Kālai'āina*, which theorized governance from a foundation of Natural Rights within a Hawaiian agrarian society based upon capitalism that was not only cooperative in nature, but also morally grounded in Christian values. Contemporary historians and academics mistakenly assumed that American capitalism was the political economy of the Hawaiian Kingdom. Along with the unlawful imposition of American municipal laws after 1898, was the unlawful imposition of the American version of capitalism. Karl Marx, the renowned critical theorist, would have found the Hawaiian Kingdom's political economy very appealing.

The Hawaiian Kingdom was the only country to adopt Wayland's theory of economics. The others, to include the United States and the United Kingdom, based their economies on Smith's theory of capitalism. Wayland's form of capitalism was taught in the schools throughout the islands and framed political and economic discourse in the country. It also set in motion Hawai'i's mixed economy and the seed was planted for the Hawaiian Kingdom to become the first welfare State that would predate the Nordic countries by a century. The welfare State is a "concept of government in which the state or a well-established network of social institutions plays a key role in the protection and promotion of the economic and social well-being of [its] citizens."[128] Article 13 of the 1864 Constitution provides that the "[Monarch] conducts [His or Her] Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among [His or Her] subjects."

The national motto, *ua mau ke ea o ka 'āina i ka pono* (the life of the land is preserved by righteousness) reflects this national discourse, which was

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[127] Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* (Honolulu, University of Hawai'i Press, 2003), 154.

[128] "Welfare state," *Encyclopedia Britannica*, accessed January 17, 2021, https://www.britannica.com/topic/welfare-state.

also adopted by the Hawaiian Kingdom Supreme Court as a legal maxim in 1847. In the words of Chief Justice William Lee:

> For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, "The life of the land is preserved by righteousness." We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, "Let justice be done though the heavens fall." Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.[129]

Education was through the medium of the native language. On January 7, 1822, the first printing of an eight-page Hawaiian spelling book was done, and all "the leading chiefs, including the king, now eagerly applied themselves to learn the arts of reading and writing, and soon began to use them in business and correspondence."[130] By 1839, the success of the schools was at its highest point, and literacy was "estimated as greater than in any other country in the world, except Scotland and New England" in the United States.[131]

The Hawaiian Kingdom became the fifth country in the world to provide compulsory education for all youth in 1841, which predated compulsory education in the United States by seventy-seven years. The other four countries were Prussia in 1763, Denmark in 1814, Greece in 1834, and Spain in 1838. Education was a hallowed word in the halls of the Hawaiian government, and, according to De Varigny, "there is no official title more envied or respected in the islands than that of a member of the board of public instruction."[132] He explains that this

> is because there is no civic question more debated, or studied with greater concern, than that of education. In all the annals of the Hawaiian Legislature one can find not one example of the legislative houses refusing—or even reducing—an appropriation requested by the government for public

[129] *Shillaber v. Waldo, et al.*, 1 Haw. 31, 32 (1847).

[130] W.D. Alexander, *A Brief History of the Hawaiian People* (New York – Cincinnati – Chicago, American Book Company, 1892), 179.

[131] Laura Fish Judd, *Honolulu: sketches of life* (New York, Anson D.F. Randolph & Company, 1880), 79.

[132] Charles De Varigny, *Fourteen Years in the Sandwich Islands*, *1855-1868* (Honolulu, University of Hawai'i Press, 1981), 151.

> education. It is as if this magic word alone seems to possess the prerogative of loosening the public purse strings.[133]

The Hawaiian Kingdom also had a study abroad program in the 1880s where 17 young Hawaiian men and one woman "attended schools in six countries where they studied engineering, law, foreign language, medicine, military science, engraving, sculpture, and music."[134]

As Gonschor points out, Hawaiian governance also had an impact on non-recognized States of Oceania and Asia.[135] In particular, Dr. Sun Yat-sen, the founding father of present-day China, who received his secondary education in the Hawaiian Kingdom at Iolani College and Punahou between 1879 and 1883, told a reporter when he returned to Hawai'i in 1910, "This is my Hawaii. Here I was brought up and educated; and it was here that I came to know what modern, civilized governments are like and what they mean."[136] His obituary in the Hawaiian language press "highlighted the importance of Hawai'i for his political ideas, pointing out that…(the enlightenment he received here in Hawai'i, the knowledge and the understanding of the quality of governance [was] here)."[137] This clearly discerns race relations toward Chinese in the United States driven by State sanctioned discrimination, and race relations in the Hawaiian Kingdom. Dr. Sun would not have learned "what modern, civilized governments are like" in the United States but only in the Hawaiian Kingdom where racism was, at the time, "unthinkable."

Secondary education, also known as High School, was done through the medium of English and were called English immersion schools. At Lahainaluna Seminary, a government run secondary education school taught the subjects of arithmetic (algebra, geometry, calculus, and trigonometry), English grammar, geography, Hawai'i's constitutional history, political economy, science, and world history. Secondary schools were predominantly attended by aboriginal Hawaiians after completing their common school education. Lahainaluna's 1882 annual exams reflect

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[133] *Id*.

[134] Agnes Quigg, "Kalakaua's Hawaiian Studies Abroad Program," *The Hawaiian Journal of History* 22 (1988): 170.

[135] Lorenz Gonschor, "Ka Hoku o Osiania: Promoting the Hawaiian Kingdom as a Model for Political Transformation in Nineteenth-Century Oceania," in *Agents of Transculturation: Border-Crossers, Mediators, Go-Betweens*, eds. Sebastian Jobs and Gesa Mackenthun (New York & Berlin, Waxmann Verlag GmbH, 2013), 157-186; see also Lorenz Gonschor, *A Power in the World: the Hawaiian Kingdom in Oceania* (Honolulu: University of Hawai'i Press, 2019).

[136] Albert Pierce Taylor, "Sun Yat Sen in Honolulu," *Paradise of the Pacific* 41, no. 8 (1928): 10; see also Yansheng Ma Lum and Raymon Mun Kong Lum, *Sun Yat-sen in Hawai'i: Activities and Supporters* (Honolulu, University of Hawai'i Press, 1999), 5.

[137] Gonschor, *A Power in the World*, 164.

the breadth of Hawaiian national consciousness.[138] Here follow sample exam questions for the senior class:

- What is government? (b) Name the forms of government of civilized nations. (c) To which of these forms of government does our government belong?
- What is the constitution of a country? Give a short history of the Constitution of 1864.
- What are the characteristics which disqualify a person from becoming Sovereign of the Hawaiian Islands?
- Name as many powers of the Sovereign as you can recollect in twenty minutes.
- What does Political Economy treat of?
- Is the tariff of the Hawaiian Kingdom a protective tariff, or a tariff for revenue?
- Write a letter of information, describing the Hawaiian Kingdom, its natural riches, chief industries, government, and social condition.
- Write your opinion on the question—"Is it better for an educated young man to seek his living in public office, or in private business"?

In 1859, universal healthcare was provided at no charge for aboriginal Hawaiians through Queen's hospital regulated and funded by the Hawaiian government.[139] Even foreigners visiting the Hawaiian Kingdom were provided health coverage during their sojourn under *An Act Relating to the Hospital Tax levied upon Passengers* (1882).[140] Section 1 of the Act provides, "The Trustees of the Queen's Hospital are hereby authorized and directed to reserve and apply to uses hereinafter mentioned the sum of two thousand and five hundred dollars per annum out of all moneys received by them as and for hospital tax levied upon and received from passengers arriving at the several ports of this Kingdom." As part of Hawai'i's mixed economy, the Hawaiian government appropriated funding for the maintenance of its quasi-public hospital, the Queen's Hospital, where the monarch served as head of the Board of Trustees comprised of ten appointed government officials and ten persons elected by the

[138] Annual Examination of the Lahainaluna Seminary (July 12th, 13th, and 14th, 1882), accessed January 17, 2021, https://hawaiiankingdom.org/pdf/1882_Annual_Examination_Lahainaluna_Secondary_School.pdf.

[139] Jeffrey J. Kamakahi, "A Socio-Historical Analysis of the Crown-based Health Ensembles (CBHEs) in Hawaii: A Satrean Approach" (PhD diss., University of Hawai'i at Mānoa, 1991), 49-125, ProQuest Dissertation & Theses Global. As to the dismantling of the universal health care during the American occupation, see David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 115-116.

[140] Hawaiian Kingdom, *Compiled Laws of the Hawaiian Kingdom* (Honolulu, Hawaiian Gazette, 1884), 666.

corporation's shareholders. According to Henry Whitney, "Native Hawaiians are admitted free of charge, while foreigners pay from seventy-five cents to two dollars a day, according to accommodations and attendance."[141] It was not until the 1950's and 1960's that the Nordic countries followed what the Hawaiian Kingdom had already done with universal health care.

## VII. HAWAIIAN NEUTRALITY

To preserve its political independence, should war break out in the Pacific Ocean, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. Provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway (1852),[142] Spain (1863)[143] and Germany (1879).[144] "A nation that wishes to secure her own peace," says de Vattel, "cannot more successfully attain that object than by concluding treaties" of neutrality.[145] Unlike other non-European States, the Hawaiian Kingdom, as a recognized neutral State, enjoyed equal treaties with European powers, including the United States, and full independence of its laws over its territory.

In his speech at the opening of the 1855 Hawaiian Legislative Assembly, King Kamehameha IV, reported, "It is gratifying to me, on commencing my reign, to be able to inform you, that my relations with all the great Powers, between whom and myself exist treaties of amity, are of the most

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[141] Henry M. Whitney, *The Tourists' Guide through the Hawaiian Islands Descriptive of Their Scenes and Scenery*, 2nd ed. (Honolulu, Hawaiian Gazette, 1895), 21.

[142] Article XV states, "All vessels bearing the flag of Sweden and Norway in time of war shall receive every possible protection, short of actual hostility, within the ports and waters of His Majesty the King of the Hawaiian Islands; and His Majesty the King of Sweden and Norway engages to respect in time of war the neutral rights of the Hawaiian Kingdom, and to use his good offices with all other powers, having treaties with His Majesty the King of the Hawaiian Islands, to induce them to adopt the same policy towards the Hawaiian Kingdom;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf.

[143] Article XXVI states, "All vessels bearing the flag of Spain shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, in time of war the neutrality of the Hawaiian Islands, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/Spanish_Treaty.pdf.

[144] Article VIII states, "All vessels bearing the flag of Germany or Hawaii shall in times of war receive every possible protection, short of actual hostility, within the ports and waters of the two countries, and each of the High Contracting Parties engages to respect under all circumstances the neutral rights of the flag and the dominions of the other;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/German_Treaty.pdf.

[145] Emerich De Vattel, *The Law of Nations*, 6th ed. (Philadelphia, T. & J.W. Johnson, Law Booksellers, 1844), 333.

satisfactory nature. I have received from all of them, assurances that leave no room to doubt that my rights and sovereignty will be respected."[146] He reiterated the Kingdom's neutrality by stating:

> My policy, as regards all foreign nations, being that of peace, impartiality and neutrality, in the spirit of the Proclamation by the late King, of the 16th May last, and of the Resolutions of the Privy Council of the 15th June and 17th July. I have given to the President of the United States, at his request, my solemn adhesion to the rule, and to the principles establishing the rights of neutrals during war, contained in the Convention between his Majesty the Emperor of all the Russias, and the United States, concluded in Washington on the 22nd July last.[147]

The actions taken by the governments of the Hawaiian Kingdom, Great Britain, France, Russia, and the United States of America, relating to the development of the principles of international law on neutrality, provided the necessary pretext for the leading European maritime powers to meet in Paris, after the Crimean War. There in Paris, on April 16, 1856, Great Britain, France, Sardinia-Piedmont, the Ottoman Empire, and Russia entered into a joint Declaration that provided the following four principles,

> 1. Privateering is, and remains, abolished. 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. 4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The United States, however, refrained from acceding to the Declaration of Paris because it still relied on "privateering" through the issuing of letters of marque in order to augment its limited and small naval force. The Hawaiian Kingdom acceded to the Declaration of Paris by virtue of an additional article to its treaty with Italy of February 27, 1864. Kamehameha V ratified the additional article on May 3, 1867, and the Italian King Victor Emmanual II ratified it on April 17, 1864. The additional article was "considered as an integral part of the Treaty of Commerce and Navigation, concluded between the Kingdom of Italy and the Hawaiian Kingdom, at Paris, the 22d July, 1863."[148]

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[146] Robert C. Lydecker, *Roster Legislatures of Hawaii* (Honolulu, Hawaiian Gazette, 1918), 57.

[147] *Id*., 57.

[148] See *Additional Article to the Treaty of Commerce and Navigation, concluded between the Kingdom of Italy and the Hawaiian Islands*, at Paris, the 22d day of July, 1863, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/Italian_Treaty.pdf.

## VIII. HAWAIIAN BELIEF IN THE RULE OF LAW

While international law preserved the legal order of the Hawaiian Kingdom as an independent State under a belligerent occupation, brute power would become the controlling factor on the ground. To that end, the insurgents deliberately played into the American discourse of racial inequality in order to protect themselves and their holdings in the kingdom—*When in Rome do as the Romans do*. They erroneously painted a picture of aboriginal Hawaiians as incapable of governing in the nineteenth century and that they were the bastion of responsible governance. A claim that lacks any basis in fact.

This rhetoric was rebuked by information the United States received in its course of investigating the overthrow. In the wake of the illegal overthrow of the Hawaiian government, a political organization was established called the Hui Hawai‘i Aloha ‘Āina (Hawaiian Patriotic League). The League had "branches in every district of the Kingdom, representing, together with a large following of foreigners, over 7,500 native born Hawaiian qualified voters throughout the islands (out of a total of 13,000 electors), and to which is annexed a woman's branch of over 11,000 members."[149] The League did not represent Hawaiian nobility but rather the people. As a national crisis reveals character, it also, in this case, reveals legal and political acumen.

Its purpose was "to preserve and maintain, by all legal and peaceful means and measures, the *independent autonomy* of the islands of Hawaii nei; and, if the preservation of our independence be rendered impossible, our object shall then be to exert all peaceful and legal efforts to secure for the Hawaiian people and citizens the continuance of their civil rights."[150] The League's leadership was comprised of accomplished and respected Hawaiian statesmen and attorneys. The League was headed by John Adams Kuakini Cummins, Honorary President, who served as an elected official and cabinet minister, and Joseph Nāwahī, President, who was an attorney that also served as an elected official and a cabinet minister as well. Leading the woman's branch was Abigail Kū‘aihelani Campbell as President.

In a statement to President Cleveland on July 15, 1893, the officers of the League specifically addressed the insurgents' erroneous claim that natives are not capable of self-government. The League emphatically and very eloquently stated:

> Our patriotic league, following the Sovereign's intention, has also repeatedly warned its members to keep the peace, under every provocation, and await with patience the judgment of the

[149] United States, *Executive Documents*, 911.

[150] *Id*., 930.

> United States Government; and while we can boast of having up to the present time successfully subdued every popular tendency for agitation or armed resistance, we must also proclaim, to the credit of the Hawaiian people, that they have behaved with a discipline, a decorum, and forbearance which we believe no other nation on earth would have shown under similar circumstances, that of a country not conquered, but confiscated by a faction of aliens.[151]
>
> The strongest argument of the men who, for personal aims, crave for the overthrow of the Hawaiian national monarchy, is that the natives are incapable of self-government, and to this flimsy and false argument the United States minister resident, J.L. Stevens, as a complaisant echo, add that the natives are always "misled by unscrupulous hoodlum foreigners," "unscrupulous hoodlum" being apparently Mr. Steven's pet diplomatic qualification for every man who does not agree with his diplomatic friends and accomplices.
>
> The historian's ready answer to these calumnies is that ever since the pacification of the country, which followed Kamehameha's conquests, the natives when left alone have had a most satisfactory, peaceful, and progressive Government, while all the dissensions, riots, and troubles recorded in the annals of these islands have ever been by or through foreigners seeking to wrench the power and wealth from the poor natives, these being ever the peaceful and patient sufferers thereby, not "misled," but terrorized and oppressed.[152]

In its closing statement to the President, the League stated:

> For all the above reasons and others too long to enumerate, we protest against the present movement in favor of doing away with the independence of our country; we protest against the effort made to force annexation to the United States without consulting the people, and we especially protest against the interference of the United States minister, Stevens, in Hawaiian politics and his violations of our sovereign rights by the unjustifiable landing of the United States troops and the biased recognition of the insurgents.
>
> We particularly resent the presumption of being transferred like a flock of sheep or bartered like a horde of untutored savages by an unprincipled minority of aliens who have no right, no legal power, no influence over us, not even a claim of conquest by fair-handed warfare, and we can not believe our friends of the great and just American nation could tolerate annexation by force against the wishes of the majority of the population, for

[151] *Id*., 912.

[152] *Id*., 914.

> such annexation would be an eternal dishonor, an indelible stain on the pure escutcheon of the leading nation of the world.[153]

In the statement made by the League in a follow up petition to the President on December 27, 1893, the officers succinctly summed up what occurred and what didn't occur. The statement not only dispels the myth that American missionaries overthrew the government, but clearly articulates the difference between a "*coup de main*" and a "revolution." The latter being a successful internal revolt, which is also called a *coup d'état*, and the former a surprise invasion by a foreign State's military force. The officers of the League clearly stated to Cleveland:

> Last January, a political crime was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole of the Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government. This was done by a coup de main of U.S. Minister Stevens, in collusion with a cabal of conspirators, mainly faithless sons of missionaries and local politicians angered by continuous political defeat, who, as revenge for being a hopeless minority in the country, resolved to "rule or ruin" through foreign help. The facts of this "revolution," as it is improperly called, are now a matter of history.[154]

## IX. THE UNTHINKABILITY OF RACE AND GENDER

Despite the insurgents' propaganda of lies, their rhetoric, however, was fueled, at the time, by U.S. politics of race relations and the superiority of the Aryan (Teutonic) race over all others. Coffman addresses this by asking what "had Lorrin Thurston learned at Columbia, and what had Sanford Dole learned from his journey up the Kennebec River?"[155] He answered, "the missionary descendants—already so prepared to believe in the superiority of their knowledge and position—were being influenced by American culture and American public life to take over direct control of Hawai'i."[156] Between 1840 and 1887, Coffman explains "a systemic theory of white supremacy had been developed that came to be described in the intellectual history of America as Social Darwinism. The keystone of Social Darwinism was the teaching of white supremacy."[157]

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[153] *Id*., 929.

[154] *Id*., 1295.

[155] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (Durham, Duke University Press, 2016), 89.

[156] *Id*.

[157] *Id*.

Burgess, a political scientist at Columbia University in 1893, was an academic who openly subscribed to white superiority through "Teutonic supremacy in the art of government."[158] According to Burgess, Teutonic governance was exemplified by "northern Europe and the United States,"[159] but the Hawaiian Kingdom government, led by aboriginal Hawaiians, was not included in this theory because the Polynesian race was not Teutonic. The insurgents, although being Hawaiian subjects and resident aliens, were representative of the so-called Teutonic race. According to Castle, Burgess firmly believed that the "exercise of political right was contingent upon innate political intelligence, and of this intelligence the Teutons were the only qualified judges."[160]

To the Hawaiian, Burgess' belief of Teutonic political intelligence would be absurd because Hawai'i's constitutional monarchy predated that of Teutonic Prussia. As German political scientist Marquardt pointed out in 2009, "Hawai'i as early as 1839, preceding even Prussia, transferred European constitutionalism, in the pattern of the constitutional monarchy, into the Austronesian-speaking world of Oceania."[161] Nevertheless, as facts were not the driving force, the situation was being driven by American racist rhetoric.

Knowing of Burgess' agenda of promoting white, in particular, Teutonic—Aryan superiority in governance, Dole was in communication with Burgess a year after the overthrow of the Hawaiian government. He wanted to draft a constitution for the insurgency that would change its name from the provisional government to the so-called Republic of Hawai'i on July 3, 1894. Concerned of the political power wielded by the aboriginal Hawaiian, which was the majority of the Hawaiian national population, the insurgents entertained Jim Crow laws from the American State of Mississippi. In a letter sent from Washington, D.C., on November 4, 1893, by W.D. Alexander, former Surveyor-General of the Hawaiian Kingdom, to Sanford Dole, he wrote, "I enclose extracts from the present Constitution of Mississippi, which is said to have the effect of disfranchising a majority of the negroes of that state."[162] The Republic of Hawai'i was in name only. It was not, by definition, a true Republic where the affairs of government were open and transparent.

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[158] *Id*.

[159] *Id*., 90.

[160] Alfred L. Castle, "Advice for Hawaii: The Dole-Burgess Letters," *The Hawaiian Journal of History* 15 (1981): 26.

[161] Gonschor, *A Power in the World*, 26.

[162] *William Dewitt Alexander to Sanford Dole*, November 4, 1893, Hawaiian Officials Abroad, series 404, box 53, folder 842, Hawai'i State Archives, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/Alexander_to_Dole_re_Constitution(11.4.1893).pdf.

In his first letter, Dole was merely asking for clarity on a section of Burgess' book *Political Science and Comparative Constitutional Law*.[163] Before Burgess responded, Dole was able to send a follow up letter that reveals his intent. In his second letter, Dole requests information from Burgess on his constitutional plan whereby "government can be kept out of the control of the irresponsible element."[164] He stated that there "are many natives and Portuguese who had had the vote hitherto, who are comparatively ignorant of the principles of government, and whose vote from its numerical strength as well as from the ignorance referred to will be a menace to good government."[165] Burgess, in his response to Dole, was aware that the so-called Teutonic population in Hawai'i was a very small minority at 5,000, which he said comprised of "Americans, English, Germans and Scandinavians" out of "a population of nearly 100,000."[166] After offering suggestions in the organizing of government, he ends his letter by recommending that "only Teutons [be appointed] to military office."[167]

When Coffman mentions the Dole-Burgess letters, he implies that the Hawaiian Kingdom did not have the same race relations as the United States. According to Dominguez, there was "very little overlap with Anglo-American" race relations.[168] She found that there were no "institutional practices [that] promoted social, reproductive, or civic exclusivity on anything resembling racial terms before the American period."[169] In comparing the two countries she stated that unlike "the extensive differentiating and disempowering laws put in place throughout the nineteenth century in numerous parts of the U.S. mainland, no parallels—customary or legislated—seem to have existed in the [Hawaiian Kingdom]."[170] Dominguez admits that with "all the recent, welcomed publishing flurry on the social construction of whiteness and blackness and the sociohistorical shaping of racial categories…, there are usually at best only hints of the possible—but very real—unthinkability of 'race.'"[171]

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[163] Henry Miller Madden, Sanford B. Dole, and John W. Burgess, "Letters of Sanford B. Dole and John W. Burgess," *Pacific Historical Review* 5, no. 1 (1936), 72.

[164] *Id.*

[165] *Id.*

[166] *Id.*, 73. The actual amount of the total population in 1893 was reported by the Hawaiian Patriotic League to the President at 96,075. United States, *Executive Documents*, 920.

[167] *Id.*, 74.

[168] Virginia R. Dominguez, "Exporting U.S. Concepts of Race: Are There Limits to the U.S. Model," *Social Research* 65, no. 2 (1998): 372.

[169] *Id.*

[170] *Id.*

[171] *Id.*, 371-372.

That very real "unthinkability of race" was the Hawaiian Kingdom. Kauai explains that the "multi-ethnic dimensions of the Hawaiian citizenry coupled by the strong voice and participation of the aboriginal population in government played a prominent role in constraining racial hierarchy and the emergence of a legal system that promoted white supremacy."[172]

To the "unthinkability of race" is added the "unthinkability" of gender. Hawaiian society was not based on race or gender, but rather class, rank and education. Hawaiian women in the nineteenth century served as *Monarchs*—Victoria Kamāmalu (1863)[173] and Liliʻuokalani (1891-1917); *Regents*—Kaʻahumanu (1823-25) and Liliʻuokalani (1881, 1891); *Prime Ministers*—Kaʻahumanu (1819-23, 1825-32, Elizabeth Kinaʻu (1832-39), Miriam Kekāuluohi (1839-45), and Victoria Kamāmalu (1855-63); *Governors*—Kuini Liliha (1829-31), Elizabeth Kinaʻu (1833-39), Lydia Nāmāhana Piʻia, Keahikuni Kekauʻōnohi, Hoapiliwahine (1840-42), and Victoria Kekaulike; *Nobles*—Kekauʻōnohi (1841-50), Keohokālole (1841-47), Kekāuluohi (1841-45), Konia (1841-51), Alapaʻi (1845-49), Kalama (1845-48), Luka (1847) and Ruth Keʻēlikōlani (1848-50); *Supreme Court Judge*—Miriam Kekāuluohi (1840-45); and *Commissioner of Private Ways and Water Rights*—Emma Kaʻilikapuolono Nakuina (1892).

Once the United States unlawfully seized control of the Hawaiian Kingdom and its people, the unthinkability of race and gender soon became the thinkable, as the American import would eventually ravage the Hawaiian Kingdom like a virus. Hawaiians became strangers in their own lands. What was once inconceivable became reality. These were only a few of the lasting effects brought about by *Americanization*.[174] In 1906, a formal policy of denationalization would be implemented in the schools throughout Hawaiʻi "whose purpose was to have the children believe they were American."[175] The *Hawaiian Gazette* reported that as "a means of inculcating patriotism in the schools, the Board of Education has agreed upon a plan of patriotic observance."[176] Inculcate, by definition, is "to

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[172] Willy Daniel Kaipo Kauai, "The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawaiʻi," (PhD diss., University of Hawaiʻi at Mānoa, 2014) 31, ProQuest Dissertations and Theses Global.

[173] As Kuhina Nui, Victoria Kamāmalu ascended to the throne upon the death of Kamehameha IV. Article 47 of the 1852 Constitution provides, "Whenever the throne shall become vacant by reason of the King's death…the Kuhina Nui, for the time being, shall, during such vacancy…perform all the duties incumbent on the King, and shall have and exercise all the powers, which by this Constitution are vested in the King."

[174] Sai, "United States Belligerent Occupation," 114.

[175] Keanu Sai, *The Impact of the U.S. Occupation on the Hawaiian People* (October 13, 2018), neaToday, accessed January 17, 2021, https://www.nea.org/advocating-for-change/new-from-nea/impact-us-occupation-hawaiian-people.

[176] "Patriotic Program for School Observance," *Hawaiian Gazette*, Apr. 3, 1906, 5, accessed January 17, 2021, https://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf.

impress upon the mind by frequent repetition or persistent urging."[177] International humanitarian law views this as the war crime of denationalization.

## X. DISPELLING THE COLONIAL MYTH

Despite the colonial context of the writing of academics, Hawai'i was never a colony of the United States or any other State. Colonialism is rooted in the international legal principle known today as the doctrine of discovery. "European countries," according to Miller, "set out to exploit new lands in the fifteenth through twentieth centuries, and planted their flags and crosses in 'newly discovered' lands, they were undertaking the well-recognized procedures and rituals of Discovery to make claims to these territories and over Indigenous peoples."[178] At least by the twentieth century, however, discovery under international law only "gives an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation."[179] Ironically, under the doctrine of discovery, the Hawaiian Kingdom acquired four additional uninhabited islands: Laysan on May 1, 1857; Lisiansky on May 10, 1857; Palmyra atoll on April 15, 1862; and Kure atoll on September 20, 1886.[180] Unlike colonial possessions at the time, these annexed islands by discovery were uninhabited.

What's more, during the reign of Kamehameha IV, the Hawaiian Kingdom entertained the annexation of inhabited islands in the South Pacific called Sikaiana but was ultimately abandoned due to the Hawaiian government being "worried about technical constraints in administering such a far outlying possession."[181] According to Gonschor,

> Despite the ultimate failure of the Sikaiana annexation scheme, what makes it extremely interesting is that the Privy Council resolution of February 29, 1856, to annex the atoll included a provision that a plebiscite was to be held among the Sikaianans to ratify the annexation of their atoll to the Hawaiian Kingdom, a progressive idea unheard of at that time. The first instance of the right of native peoples to self-determination being

[177] Webster's New World Dictionary, 2nd ed. (New York, Prentice Hall Press, 1986), 713.

[178] Robert J. Miller, "The International Law of Colonialism: A Comparative Analysis," *Lewis & Clark Law Review* 15 (2011): 849.

[179] Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford, Clarendon Press, 1990), 146.

[180] David Keanu Sai, "Hawaiian Constitutional Governance," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 86.

[181] Gonschor, *A Power in the World*, 57.

> acknowledged anywhere in the Pacific Islands, this response of the Hawaiian government to St. Julian's cession proposal testifies once more of the progressiveness of Hawaiian policy.[182]

Commenting on the proposed annexation of Sikaiana, Lenzerini states that this clearly shows "that the idea of self-determination was well-entrenched in the understanding of internal and international relations by the Hawaiian Kingdom well before it was accepted as a rule of international law."[183]

In 1994, James Anaya, who served as the United Nations Special Rapporteur for Indigenous Peoples, authored a law article concerning the legal status of aboriginal Hawaiian self-determination. Anaya wrote, "Despite the injustice and illegality of the United States' forced annexation of Hawaii, it arguably was confirmed pursuant to the international law doctrine of effectiveness. In its traditional formulation, the doctrine of effectiveness confirms *de jure* sovereignty over territory to the extent it is exercised *de facto*, without questioning the events leading to the effective control."[184]

Anaya cited two international law scholars, Oppenheim and Hall, to support his contention. His citation, however, reveals that Oppenheim explains that effective occupation "is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State,"[185] and that "occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State."[186] Hall concurs with Oppenheim's description of the doctrine. Unlike tribal nations, the Hawaiian Kingdom was an independent State, and the Hawaiian Islands did come "under the sovereignty," as Oppenheim states, "of another State"—the Hawaiian Kingdom. Anaya's assertion is a plain misreading of Oppenheim and Hall. Whether his misreading was intentional or not is inconsequential, as the Hawaiian Kingdom was an independent State in the nineteenth century and the doctrine of discovery/occupation does not apply on the territory of another State.

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[182] *Id.*

[183] Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu, Ministry of the Interior, 2020), 215.

[184] James Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs," *Georgia Law Review* 28 (1994): 329.

[185] Lassa Oppenheim, *International Law,* Vol. I—Peace, 3rd ed. (London, Longmans, Green and Co., 1920), 383.

[186] *Id.*

Effective occupation by discovery should not be confused with belligerent occupation under international humanitarian law. The two principles are separate and distinct where the latter applies to territory of an existing State and the former applies to territory that is not recognized as a State. The territory of the occupied State that is being effectively occupied by the occupying State does not remedy an inchoate title, but rather triggers the international law of occupation until a peace treaty is negotiated. The peace treaty could provide the cession of territory from the conquered State such as the case of the 1848 Treaty of Guadalupe-Hidalgo that ceded former Mexican territory to the United States north of the Rio Grande river.[187] There is no treaty where the Hawaiian Kingdom, like Mexico, ceded sovereignty and territory to the United States.

During the American occupation of Japan that began in 1945, United States Army General Douglas MacArthur served as the military governor in charge of administering Japanese municipal laws—not the municipal laws of the United States, over Japanese territory. Throughout the seven years of belligerent occupation until 1952, the United States did not acquire any title of sovereignty over Japan. International title of sovereignty remained in the Japanese State despite its government being militarily overthrown when it signed the treaty of surrender in 1945.

What would appear to be a colonial situation may not be at all. Young makes this point by drawing attention to the Jewish settlements in Palestine. Referring to Fanon's often quoted "dividing line" where the "colonized world is a world cut in two,"[188] Young writes,

> …such a juxtaposition of two divided zones is most visible in the Occupied Territories in the West Bank in Palestine, where the Jewish settlements are built onto the landscape with high concrete walls dividing them from the overcrowded towns and villages of the Palestinians, accessed by special sealed-off highways to which local Palestinians have no access. While the question of whether Israel itself constitutes a settler colony has been fiercely debated [it does] not constitute a late-modern settler colony in a formal and political sense.[189]

To label Palestine an Israeli colony would be absurd because Palestine is a State under international law and, as a State, the Palestinian people have rights, as protected persons, under the Fourth Geneva Convention that apply during a belligerent occupation. As such, it affords the Palestinian authority and people access to mechanisms, that it would not otherwise have as a non-State, to hold to account Israeli aggression on its territory

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[187] 9 Stat. 922.

[188] Frantz Fanon, *The Wretched of the Earth* (New York, Grove Press, 1961), 3.

[189] Robert J.C. Young, *Empire, Colony, Postcolony* (West Sussex, John Wiley & Sons, 2015), 35.

that is not in conformity with the law of occupation. It was admitted as a non-Member State of the United Nations with observer status in 2012 by resolution of the General Assembly.[190] Palestine is also a Contracting Power to the 1907 Hague Convention, I, Pacific Settlement of International Disputes that established the Permanent Court of Arbitration. Accession at the PCA is available only to States—a right which Palestine exercised in 2015.

Despite the international recognition of Palestinian Statehood, Israel contends that the "law of occupation does not apply to Palestinian territory, since there was no sovereign Palestinian state before 1967, and that the territory's status is 'disputed.'"[191] Israel has not recognized Palestine as an independent State, which has turned a belligerent occupation into a deadly political game. However, while Israel is effectively occupying portions of Palestinian territory, calling it a colonizer would erroneously give Israel an inchoate title to these territories under the doctrine of discovery. Furthermore, for critical theorists to call Palestine an Israeli colony would also be antithetical to its core belief of emancipating the oppressed. It would only reinforce Israel's oppression and control of the Palestinian people in violation of their right to self-determination.

The Hawaiian-American situation is much different due to there being no dispute of the Hawaiian Kingdom as an independent State and the United States recognized Hawaiian statehood in the nineteenth century. When Hawai'i is referred to as an American colonial situation and aboriginal Hawaiians as an indigenous people by academics, Craven explains that it "implicitly accede[s] not only to the reality, but also to the legitimacy, of occupation and political marginalization. All they might hope for at that level is formal recognition of their vulnerability and continued political marginalization rather than the status accorded under international law to a nation belligerently occupied."[192] Hawaiian indigeneity promotes this false narrative.

## XI. WHAT, NOT WHO, ARE INDIGENOUS PEOPLES

Westphalian statehood and sovereignty would not apply to indigenous nations because they are not independent States themselves, but rather, as

[190] GA Resolution A/RES/67/19 (Nov. 29, 2012).

[191] Velentina Azarova, "Prolonged Occupation: Consequences Under An Integrated Legal Framework," *Policy Brief; European Council on Foreign Relations* (2017), 6.

[192] Matthew Craven, "Hawai'i, History and International Law," *Hawaiian Journal of Law & Politics* 1 (2004): 8.

stated by Corntassel and Primeau, are "stateless group[s]"[193] residing within the territorial dominions of existing independent States. In 2002, the International Court of Justice maintained that indigenous nations are not States.[194] Aboriginal Hawaiians are not an indigenous people but rather comprise the majority of the national population of the Hawaiian Kingdom, being an independent State. Article 1(1)(b) of the ILO Convention No. 169 clearly identifies indigenous peoples as being "peoples *in independent nations* who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions (emphasis added)." This distinction between indigenous peoples and the State they reside in is also nuanced throughout the United Nations Declaration on the Rights of Indigenous Peoples.[195]

While there is an ongoing debate as to "who" is to be identified as "indigenous" that would entitle them to specific rights of indigenous peoples, there is no debate as to "what" indigenous peoples are, which are not independent States. Federico Lenzerini, Rapporteur of the Committee on the Rights of Indigenous Peoples of the International Law Association, explains:

> [T]he kind of self-determination commonly referred to as international self-determination—which is the one that is recognized in favour of indigenous peoples—is not the category of the right to self-determination which is claimed by the Hawaiian people, intended as the *national people of the Hawaiian Kingdom*. In fact, as stated by the Committee on the Rights of Indigenous Peoples, the latter peoples have an international legal right to negotiate "within their State," implying that indigenous peoples are not States of their own, but reside and are entitled to exercise their rights within an existing State. This characterization does *not* apply to Native Hawaiians as citizens of the Hawaiian Kingdom, who rather claim to be a national people under foreign occupation.[196]

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[193] Jeff J. Corntassel and Tomas Hopkins Primeau, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination,'" *Human Rights Quarterly* 17, no. 2 (1995), 347.

[194] Land and Maritime Boundary Between Cameroon & Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, para. 205-07 (Oct. 10) ("In the view of the Court many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States.").

[195] U.N. Document A/61/L.67 (Sep. 12, 2007).

[196] Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom," 214.

As Hawaiian nationals of an occupied State—the Hawaiian Kingdom, they are "entitled to the protection of its territorial integrity."[197] This right of self-determination should not be confused with internal self-determination of indigenous peoples as previously explained or external self-determination of a colonized people to choose to become their own State through decolonization, as was the case of East Timor or Algeria separating from colonial rule. Self-determination for existing States, according Judge Crawford, takes on the "well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government."[198] The exercise of self-determination by nationals of an occupied State is realized when the belligerent occupation has ended, and the people regain unfettered access to their governmental institutions in the exercise of their civil and political rights.

## XII. THE HAWAIIAN INDIGENEITY MOVEMENT

There is a growing movement amongst academics and scholars, under the banner of Hawaiian indigeneity, to revise Hawai'i's history. The movement is a subset of an indigenous rights discourse, that sees western culture, to include its laws, as an opposing force that requires critique along racial and gender lines. According to indigenous scholar, Taiaiake Alfred, the "movement—referred to in terms of 'aboriginal self-government,' 'indigenous self-determination,' or 'Native sovereignty'—is founded on an ideology of indigenous nationalism and a rejection of the models of government rooted in European cultural values."[199] State theory and sovereignty is not used to explain indigeneity. Rather, it is seen as a Euro-centric object that established a colonial situation. Without a State that serves as the colonial power there can be no colonial situation to critique. In this sense the colonizing State is the *Other* to its counterpart—the colonized people that critical theorists seek to emancipate.

Proponents of Hawaiian indigeneity use the term *kanaka maoli* to identify Hawai'i's native people, but their use of the term is loose. First, *kanaka maoli* in the Hawaiian language is a noun for full-blooded Hawaiian person,[200] and *hapa* is a person of "mixed blood, as *hapa Hawai'i*, part Hawaiian."[201] The English equivalent to *kanaka maoli* and *hapa* is

[197] Crawford, *The Creation of State in International Law*, 2nd ed., 119.

[198] James Crawford, *The Creation of States in International Law* (Oxford, Clarendon Press, 1979), 100.

[199] Taiaiake Gerald Alfred, Wasase: Indigenous Pathways of Action and Freedom (University of Toronto Press, Higher Education Division, 2005), 39-40.

[200] Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* (Honolulu, University of Hawai'i Press, 1986), 127.

[201] *Id*., 58.

aboriginal Hawaiian and can be found in the law reports[202] and statutes of the Hawaiian Kingdom.[203] The term aboriginal Hawaiian is also used in the will of Bernice Pauahi Bishop that established *The Kamehameha Schools* in 1887. Under the thirteenth article of her last will and testament, it provides that "a portion of each year's income [be devoted] to the support and education of orphans, and other in indigent circumstances, giving preference to *Hawaiians of pure or part aboriginal blood* (emphasis added)."[204] In the Hawaiian Kingdom, Hawaiian was a short term for Hawaiian subject, the nationality, and it included non-aboriginals like Lorrin Thurston and Sanford Dole, the leaders of the insurgency. American municipal law after 1893 sought to change this term to mean a particular race within the United States.

The subjective conclusions of American empire, colonization and indigeneity also stand in conflict with recent publications and research that posits the Hawaiian Kingdom's continued existence as a State under international law despite the overthrow of its government.[205] This renewed

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[202] See *Naone v. Thurston*, 1 Haw. 392 (1856), *Rex v. Booth*, 2 Haw. 616 (1863), *In re Estate of His Majesty Lunalilo*, 4 Haw. 162 (1879), *Makea v. Nalua* 4 Haw. 221 (1879), and *Bishop v. Gulick*, 7 Haw. 627 (1889).

[203] See 1846 labor tax in the Hawaiian feudal system, "section I. The labor tax hereby imposed, and hereinafter prescribed, shall be solely applicable to male subjects of His Majesty, born of native aboriginal mothers." 1847 appellate law that apply "in all cases and causes of controversy arising purely between aboriginal natives of these islands."

[204] Last Will and Testament of Bernice Pauahi Bishop (1884), accessed January 17, 2021, https://www.ksbe.edu/about_us/about_pauahi/will/.

[205] David J. Bederman and Kurt R. Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii," *American Journal of Law and Politics* 95 (2001): 904; Patrick Dumberry, "The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continuity as an Independent State under International Law," *Chinese Journal of International Law* 1 (2002): 655; Mykkanen, *Inventing Politics*; Anne Keala Kelly, "A kingdom inside: the future of Hawaiian political identity," *Futures* 35 (2003): 999 (2003); Craven, "Hawai'i, History and International Law;" Kanalu Young, "An Interdisciplinary Study of the Term 'Hawaiian,'" *Hawaiian Journal of Law & Politics* (2004): 23; David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," *Hawaiian Journal of Law & Politics* 1 (2004): 46; Kanalu Young, "Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001," *Hawaiian Journal of Law & Politics* 2 (2006): 1; Kamanamaikalani Beamer and T. Ka'eo Duarte, "Mapping the Hawaiian Kingdom: Colonial Venture," *Hawaiian Journal of Law & Politics* 2 (2006): 34; Umi Perkins, "Teaching Land and Sovereignty – A Revised View," *Hawaiian Journal of Law & Politics* 2 (2006): 97; David Keanu Sai, "A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i Today," *Journal of Law and Social Challenges* 10 (2008): 68; Kamanamaikalani Beamer, "Na wai ka mana? 'Oiwi Agency and European Imperialism in the Hawaiian Kingdom," (PhD diss., University of Hawai'i at Mānoa, 2008), ProQuest Dissertations & Theses Global; David Keanu Sai, "The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State," (PhD diss., University of Hawai'i at Mānoa, 2008), ProQuest Dissertations & Theses Global; Donova C. Preza, "The Emperical Writes Back: Re-Examing Hawaiian Dispossession Resulting from the Māhele of 1848," (MA thesis, University of Hawai'i at Mānoa, 2010), ProQuest Dissertations &

research into nineteenth century Hawai‘i has revealed gross misinterpretations by contemporary historians of events in the Hawaiian Kingdom that became fertile grounds for the indigenous rights discourse to plant its flag of emancipating the so-called oppressed aboriginal Hawaiian from missionary and Hawaiian aristocratic control. There was no race or gender oppression in nineteenth century Hawai‘i until it was imported from the United States and institutionalized after 1893.

What triggered this renewed research in the academy was the *Larsen* case. At the center of the case was the "unlawful imposition of American municipal laws" over Hawaiian Kingdom territory. If the Hawaiian Kingdom had been a colonial possession of the United States and its aboriginal population an indigenous people, it could not, simultaneously,

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Theses Global; Peter Kalawai‘a Moore, "He Hawai‘i Kakou: Conflicts and Continuities of History, Culture and Identity in Hawai‘i," (PhD diss., University of Hawai‘i at Mānoa, 2010), ProQuest Dissertations & Theses Global; David Keanu Sai, *Ua Mau Ke Ea—Sovereignty Endures: An Overview of the Political and Legal History of the Hawaiian Islands* (Honolulu, Pū‘ā Foundation, 2011); Ronald Williams Jr., "To Raise a Voice in Praise: The Revivalist Mission of John Henry Wise, 1889-1896," *The Hawaiian Journal of History* 46 (2012): 1; Kalani Makekau-Whittaker, "Lahui Na‘auao: Contemporary Implications of Kanaka Maoli Agency and Educational Advocacy During the Kingdom Period," (PhD diss., University of Hawai‘i at Mānoa, 2013), ProQuest Dissertations & Theses Global; Ron C. Williams Jr., "Claiming Christianity: The Struggle Over God and Nation in Hawai‘i, 1880-1900," (PhD diss., University of Hawai‘i at Mānoa, 2013), ProQuest Dissertations & Theses Global; Gonschor, "Ka Hoku o Osiania;" Kauai, "The Color of Nationality;" Kamanamaikalani Beamer, *No Mākou Ka Mana: Liberating the Nation* (Honolulu, Kamehameha Publishing, 2014); David Keanu Sai, "Hawaiian Neutrality: From the Crimean Conflict Through the Spanish-American War," (September 12, 2015), accessed January 17, 2021, http://www2.hawaii.edu/~anu/pdf/Cambridge_Paper_Hawaiian_Neutrality.pdf; Coffman, *Nation Within*; Lorenz Rudolf Gonschor, "'A Power in the World': The Hawaiian Kingdom as a Model of Hybrid Statecraft in Oceania and a Progenitor of Pan-Oceanism," (PhD diss., University of Hawai‘i at Mānoa, 2016), ProQuest Dissertations & Theses Global; Dennis Riches, "This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation," *Center for Glocal Studies* (2016): 81; Alessandro Pulvirenti, "The Overthrow of the Hawaiian Kingdom: Did International Law Permit the Threat of the Use of Force in 1893?," *Swiss Review of International & European Law* 26 (2016): 581; Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government* (Apr. 2, 2018), neaToday, accessed January 17, 2021, https://www.nea.org/advocating-for-change/new-from-nea/illegal-overthrow-hawaiian-kingdom-government; Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom* (Oct. 1, 2018), neaToday, accessed January 17, 2021, https://www.nea.org/advocating-for-change/new-from-nea/us-occupation-hawaiian-kingdom; Sai, *The Impact of the U.S. Occupation*; Thomas A. Woods, M. Puakea Nogelmeier, and David Keanu Sai, "Charting a New Course for the Ship of State: Hawai‘i Becomes a Constitutional Monarchy," in *Kokua Aku, Kokua Mai: Chiefs, Missionaries, and Five Transformations of the Hawaiian Kingdom* ed. Thomas A. Woods (Honolulu, Hawaiian Mission Children‘s Society, 2018), 143; Gonschor, *A Power in the World*; David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu, Ministry of the Interior, 2020); David Keanu Sai, "The Royal Commission of Inquiry;" Sai, "Hawaiian Constitutional Governance;" Sai, "United States Belligerent Occupation of the Hawaiian Kingdom;" Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law;" Schabas, "War Crimes Related to the United States Belligerent Occupation;" Lenzerini, "International Human Rights Law and Self-Determination of Peoples."

be an independent State and be granted access to the Permanent Court of Arbitration. The *Larsen* case overturned the apple cart of the so-called colonial underpinnings in the Hawaiian Kingdom.

The indigenous rights discourse has no applicability to Hawai‘i whether in the nineteenth, twentieth or twenty-first centuries because it applies to tribal nations to which aboriginal Hawaiians do not belong. Prior to Captain James Cook's arrival in the Hawaiian Islands in 1778, aboriginal Hawaiian society was complex and highly stratified, not as a tribe but rather a State. Anthropologists are now conceding that two Polynesian societies, those of Hawai‘i and Tonga, had achieved a standing referred to as an "archaic" or "primary" State. These States are distinct from the European States that came into existence by the 1648 Treaty of Westphalia. Hommon was the first to point this out in the 1970s when he "suggested that classical Hawai‘i had transcended the category of a mere 'complex chiefdom' and was displaying features of an 'archaic state.'"[206] Gonschor argues that classical "Hawai‘i, alongside classical Tonga, accordingly should be counted as one of the very few cases of primary state formation, that is, state formation without outside influence from existing states analogous to ancient civilizations such as Egypt, Mesopotamia, the Indus Valley, China, and Central America."[207]

Aboriginal Hawaiians, both pure and part, comprised the majority of the nationals of the Hawaiian State—the Hawaiian Kingdom, and the government was headed by an aboriginal Chief where "it is provided by the 22d Article of the Constitution that the kings of Hawaii shall be chosen from the native chiefs of the kingdom."[208] The aboriginal Hawaiian, both nobility and commoner, were the embodiment of the Hawaiian Kingdom after King Kamehameha I consolidated the other two Polynesian kingdoms of Maui and Kaua‘i into one kingdom. This consolidation resembled that of King Egbert of Wessex and his consolidation in 829 A.D. of the seven Anglo-Saxon kingdoms of southeast Britain, which later came to be known as England.[209]

The Hawaiian Kingdom had been a British protectorate since 1794 through voluntary cession by Kamehameha I.[210] In 1843, Great Britain and France jointly recognized the Hawaiian Kingdom "as an independent State," thus bringing to an end any international claim Great Britain may

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[206] Gonschor, *A Power in the World*, 16.

[207] *Id*., 18.

[208] *An Act To Perpetuate the Genealogy of the Chiefs of Hawaii*, Laws of His Majesty Kalakaua, King of the Hawaiian Islands, passed by the Legislative Assembly 16 (1880).

[209] F.M. Stenton, *Anglo-Saxon England* (Oxford, Clarendon Press,1943), 230.

[210] Sai, *Ua Mau Ke Ea*, 21.

have previously held over the Hawaiian Islands.[211] The transformation from British protectorate to independent State also took place with another Polynesian kingdom—Tonga. Prior to British recognition of Tongan independence in 1970, it was a British protectorate since 1900 where Britain controlled foreign affairs, but internal governance was run by the Tongan monarchy under a constitutional form of government since 1845. In 1875, the Tongan government adopted the provisions of the 1864 constitution of the Hawaiian Kingdom.[212] Under this constitution, "the Tongan legislature consists of nobles and representatives sitting together, and all other provisions not specifically altered to adapt them to Tongan specificities, are identical to the 1864 Hawaiian Constitution."[213]

## XIII. SHORTCOMINGS OF HISTORICAL ANALYSIS

Within three generations since its implementation, the national consciousness of the Hawaiian Kingdom had become erased. This was the ultimate aim of the insurgency, which was evidenced in the record of a Council of State meeting of the so-called Republic of Hawai'i in 1895. Samuel Damon, who served as the group's Vice-President, stated, "If we are ever to have peace and annexation the first thing to do is to obliterate the past."[214] According to Beamer, the events that occurred after 1893 "were not colonial; they were active attempts at obliterating Hawaiian nationalism. The goal was to replace all forms of Hawaiian nationality in the population with a new identity as something similar to colonial subjects."[215] As Gonschor accurately states, "American indoctrination of the people of Hawai'i had profound negative consequences not only on Hawaiian culture and identity, but also on the islands' historiography. As soon as the Missionary Party—or, as loyalist newspaper editor Edmund Norrie called them, the *American Mafia*—had taken the reins of power, they began to systemically rewrite the country's history and obscure and discredit the achievements of the Hawaiian Kingdom (emphasis added)."[216]

The aboriginal Hawaiian community had been the subject of extreme prejudice and marginalization since the United States imposed its authority in the Hawaiian Islands, and the history books that followed routinely portrayed the native Hawaiian as passive and inept. According

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[211] *Id*., 50.

[212] Gonschor, *A Power in the World*, 119.

[213] *Id*.

[214] Beamer, *No Mākou Ka Mana*, 197.

[215] *Id*.

[216] Gonschor, *A Power in the World*, 158.

to Holt, the self-respect of native Hawaiians had been "undermined by carping criticism of 'Hawaiian beliefs' and stereotypes concerning our being lazy, laughing, lovable children who needed to be looked after by more 'realistic' adult oriented caretakers came to be the new accepted view of Hawaiians."[217] This stereotyping became institutionalized, and is evidenced in the writings by historian Gavan Daws, who, in 1974, wrote, "Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization."[218] Daws' subjective conclusion, which became a historical fact in the academy, is devoid of the facts aforementioned. Daws, although born in Australia, was an American apologist that published from a position of privilege in Hawai'i.

Critical race theory acknowledges how race is a key component to systems of law and brings "together issues of power, race, and racism to address power imbalances particularly as these are racialized."[219] By reducing "practical societal questions about the good life and aims to solve technical problems," critical theory seeks to change society by emancipating a suppressed people through critical analysis. [220] It centers on race and the imposition of western laws over a particular group of people, which led to a systemic pattern of oppression. Critical race theorists have since entered the discourse by saddling up with Hawaiian historians that initiated the narrative of abusive missionaries and their imposition of western laws to the detriment of the aboriginal Hawaiian.

The seeds of Hawaiian indigeneity were planted in the 1990s by academics who were primarily concerned with countering the prevailing narrative that native Hawaiians were inept and naïve. Instead of investigating whether aboriginal Hawaiians in the nineteenth century *did* understand western culture and law and appropriated it for themselves, they went on a destruction spree of Hawaiian Kingdom institutions. Their claim was that these institutions were not Hawaiian but were western in thought and incrementally imposed by the American missionaries over the aboriginal Hawaiian in their thirst for wealth and power, which eventually culminated in the overthrow of the country. In my law article addressing the problems of Hawaiian indigeneity I write, "This point of view frames the U.S. takeover of the Hawaiian Islands as *fait accompli*—a history no different

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[217] John Dominis Holt, *On Being Hawaiian*, 4th ed. (Honolulu, Hawai'i Kū Pa'a Publishing, 1995), 7.

[218] Gavan Daws, *Shoal of Time* (Honolulu, University of Hawai'i Press, 1974), 291.

[219] Aja Y. Martinez, "Critical Race Theory: Its Origins, History, and Importance to the Discourses and Rhetorics of Race," *Frame-Journal of Literacy Studies* 27, no. 2 (2014): 17.

[220] C. Engelbrecht, *Limitations in History. Part II. Theory and Eastern Cape Historical Research*, 9, Academia. August 15, 2020, accessed January 17, 2021, https://www.academia.edu/39811585/Limitations_in_History_Part_II_Theory_and_Eastern_Cape_Historical_Research.

than other western, colonial takeovers of indigenous people and their lands throughout the world."[221]

The two keystones of the Hawaiian indigeneity bridge are Kame'eleihiwa's 1992 book *Native Lands and Foreign Desires* and Osorio's 2002 book *Dismembering Lahui*. Both are aboriginal Hawaiian historians who take aim at Hawaiian Kingdom governance regarding land distributions and political power. Kame'eleihiwa focuses on the 1848 Great Māhele—a land division between the government, chiefs and commoners, and Osorio's focus is on the legislative branch, in particular, the House of Representatives that supposedly came under the control of foreigners in 1851.

These two publications are routinely cited by academics who dismiss the Hawaiian Kingdom because it is a product of foreign imposition. In this sense, the Hawaiian Kingdom would be treated as the *Occidental* to the *Oriental*. Kame'eleihiwa and Osorio's conclusions have been readily accepted and taken for granted as historical facts in the academy; yet these conclusions belie the historical records. Notwithstanding, Hawaiian indigeneity has been on a track of creating its own discourse. No one bothered, however, to interrogate their conclusions, but merely accepted it. This is likely due to a widely-held understanding that Kame'eleihiwa and Osorio were the native voices that were silenced by so-called American missionary ilk in the nineteenth century. Historical records fail to support this proposition.

According to Fales, "the primary task of the historian [is] to report historical facts," which he defines as "an event which influences the minds of people so as to bring about unique, irreversible changes in their pattern of thinking, initiating an indefinite series of noticeable effects upon their style of living."[222] "The establishment of a historical fact," according to Gruner, "is usually described as an inference of this fact from present evidence (as well as from previously established facts which are taken for granted)."[223] In describing the task of history, Gruner relies on Reis and Kristeller who wrote that the historian's task is to build "a body of information which provides the most certain and simplest explanation of all available materials."[224]

Before historians can explain a historical event, the event, itself, would need to warrant the attention of the historian. The research question, guided by the hypothesis, would be the framework the historian would use

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[221] Sai, "A Slippery Path," 71.

[222] Walter Fales, "Historical Facts," *The Journal of Philosophy* 48, no. 4 (1951): 85.

[223] Rolf Gruner, "Historical Facts and the Testing of Hypothesis," *American Philosophical Quarterly* 5, no. 2 (1968): 124.

[224] *Id*.

in determining what facts are relevant and those that are not. In her book, Kameʻeleihiwa reveals her bias.

> The culmination of changes in traditional Land tenure in Hawaiʻi in 1848 is commonly known as the "Great Mahele." I refer to it simply as the "1848 Mahele" because it proved to be such a terrible disaster for the Hawaiian people, and the word "great" has a connotation of superior. It was a tragic historical event, a turning point that had catastrophic negative consequences for Hawaiians.[225]

This subjective conclusion that the Māhele was a "tragic historical event" was Kameʻeleihiwa's own making. Historians did not call this historical event as tragic. Kameʻeleihiwa draws attention to Marion Kelly who, in her M.A. thesis in anthropology, "placed a new emphasis on the effect of the Māhele on the makaʻainana Hawaiian (commoner)."[226] Kelly introduced the framing of Hawaiian land tenure to be a conflict between the missionaries and chiefs, as the *bourgeoise*, and the Hawaiian commoner as the *proletariat*. Kameʻeleihiwa sought to confirm this bias. Osorio also hints at the hypothesis that guided Kameʻeleihiwa's research. He writes:

> As significant an event as the Mahele has proven to be, historians have seen it as a way of making specific indictments either of Aliʻi or of colonialism. No one disagrees that the privatization of lands proved to be disastrous for Makaʻainana [commoners], yet the focus of every study, from John Chinen's 1958 work to Kameʻeleihiwa in 1992, has been to try and establish the principal responsibility for its "failure."[227]

The underlying basis for the "failure" of the 1848 Māhele is explained by Kameʻeleihiwa where she alleges that the commoner class only received "a total of 28,658 acres of Land [in fee-simple], which is less than 1 percent of the total acreage of Hawaiʻi."[228] This alleged travesty of the commoners would then be attributed to the western legal systems that commoners could not understand or comprehend because of their traditional political and social relationships. According to Kameʻeleihiwa, the "vast majority of Native Hawaiians simply did not understand the capitalist uses of private ownership of ʻĀina (land): they did not know how to use ʻĀina to increase their wealth."[229]

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[225] Lilikala Kameʻeleihiwa, *Native Land and Foreign Desires* (Honolulu, Bishop Museum Press, 1992), 8.

[226] *Id.*

[227] Jonathan Kay Kamakawiwoʻole Osorio, *Dismembering Lahui* (Honolulu, University of Hawaiʻi Press, 2002), 44.

[228] Kameʻeleihiwa, 295.

[229] *Id.*, 11.

Osorio accepts this as a historical fact by stating that the "single most critical dismemberment of Hawaiian society was the Māhele or division of lands and the consequent transformation of ʻāina into private property between 1845 and 1850."[230] Osorio restates Kameʻeleihiwa's numbers and adds the "failure" of governance to the "failure" of land distribution, which he concluded happened in 1851. According to Osorio, the "haole (white foreigner) were insinuating themselves to fill the spaces created by that dismemberment. They began with oaths of allegiance, they progressed to recognizing themselves as legal titleholders to the land, and they capped it off by taking over the House of Representatives in 1851, after awarding suffrage to haole whether they were citizens or not."[231] There is no evidence, however, that aliens served in the House of Representatives.

Instead of "testing" the hypothesis that privatization of lands was disastrous in the Hawaiian Kingdom, these historians sought to only "prove" their hypothesis that the Māhele was a disaster and the foreigner seized control of the House of Representatives. There is obviously a "difference between impartially evaluating evidence in order to come to an unbiased conclusion and building a case to justify a conclusion already drawn."[232] The latter is *confirmation bias* where "one selectively gathers, or gives undue weight to, evidence that supports one's position while neglecting to gather, or discounting, evidence that would tell against it."[233]

What is missing in Kameʻeleihiwa's publication is any theory of land tenure. While she specifically mentions fee-simple, life estates, and commutation, she does not explain these terms in the context of Hawaiian land tenure and how Hawaiian authorities appropriated these terms from other countries. Instead, she frames the event through the lens of Hawaiian metaphors she created in her second chapter where she explains, "I construct a model of Hawaiian metaphors regarding ʻĀina and discuss the interplay between major political figures, the Aliʻi Nui, prominent missionaries, and pressures for change from various foreigners."[234] This would be analogous to a historian explaining a cricket match between England and Pakistan with American baseball metaphors. This opens wide the gate for confirmation bias and subjective conclusions based on inaccurate interpretation of facts.

One such misinterpretation is her conclusion that commoners only received 28,658 acres of land through the Māhele in 1848. The Māhele

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[230] Osorio, 54.

[231] *Id*., 56.

[232] Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises," 2(2) *Review of General Psychology* 2, no. 2 (1998): 175.

[233] *Id*.

[234] Kameʻeleihiwa, 13.

was not the defining moment of private ownership in the Hawaiian Kingdom but rather an event in concert with other events that transpired before and after 1848. The Māhele was drawing from the Prussian experience from 1808-1810 when Frederick William III ended Prussia's feudal system, emancipated the peasantry and made them landowners.[235] Kamehameha III was about to do the same by emancipating the commoner class and making them landowners. In the Privy Council meeting, Chief Justice William Lee explained to the Chiefs that the Prussian King's edict "met with much difficulty and strong opposition from the Nobles, but as soon as these wise principles were carried into effect, the most blessed influences were felt and acknowledged by all classes."[236]

In 1845, the Hawaiian Kingdom initiated the necessary steps to regulate private ownership of land. It's first act was the establishment of the Board of Commissioners to Quiet Land Titles (Land Commission) on December 10, 1845, whose mandate was to investigate claims to proprietary interests in land acquired prior to 1845, *i.e.* fee-simple, life estates, or leasehold titles. All claims to these proprietary interests acquired in land had to be filed by individuals with the Land Commission between February 14, 1846 and February 14, 1848.

The Land Commission, which existed as an administrative court, confirmed these claims with a Land Commission Award, or if the claims were rejected due to the lack of evidence it received no award and the lands were considered to remain government lands. The Chiefs and commoners were not required to file any claims with the Land Commission, as they were still under the feudal tenure—*ali'i 'ana*, but if they did acquire a proprietary interest separate from their position in the feudal structure, they were required to file a claim to be confirmed or rejected. This is the reason that the majority of the claims filed were by foreigners.

In its investigation, the Land Commission confirmed that a fee-simple title, as early as 1843, was granted by Kamehameha III and the Premier to J.P. Parker under Land Commission Award no. 511. A life estate acquired by William Crowningburgh in 1832 was confirmed and awarded under Land Commission Award no. 433, and a 55-year lease acquired by William Sumner in 1839 was confirmed under Land Commission Award no. 152. These awards clearly reveal that private ownership did exist before the Māhele in 1848.

The Chiefs and commoners were filing their claims with the Land Commission not by statutory mandate, but rather by direction of Kamehameha III in order to facilitate the division of lands between the Government, Chiefs (Konohikis) and commoners, which was called the Great Māhele. In the Hawaiian language the word "māhele" is to divide

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[235] L. Brentano, "Agrarian Reform in Prussia," *The Economic Journal* 7, no. 25 (1897): 3.

[236] Hawaiian Kingdom, *Privy Council Minutes*, Vol. 2, (Dec. 18, 1847), 123.

that which was once "māhele 'ole" or undivided, being the Hawaiian feudal tenure. This directive for the Chiefs and commoners to file their claims with the Land Commission under the rules of the Māhele caused confusion amongst both classes because the two-year window was coming to a close on February 14, 1848. This is especially so because the last division between Kamehameha III and the two remaining Chiefs was dated March 7, 1848, which was after the window closed on Febuary 14th to the file a claim with the Land Commission.

The negotiations of the Māhele began in December of 1847 and certain rules of the division were adopted by resolution in Privy Council on December 18, 1847, which would not only guide the division process, but also contractually bind the King and the Konohikis to adhere to the rules of the division and the right of commoners to acquire a fee-simple title to the lands they occupied under the Konohikis or the Government.[237] The Great Māhele in 1848 did not begin private ownership of lands in Hawai'i, rather, it was the beginning of private ownership for the Konohikis and commoners who were previously under the ancient system of land tenure.

The directive for the Chiefs to file their claim with the Land Commission is explicitly stated in the 1848 Māhele book. The Māhele book is also the evidence of the adherence to the division rules by the King and Chiefs where the division with the Tenants in fee-simple would occur when "said Tenants shall desire a division."[238] Before the Konohikis received lands they had to consent to the division and were directed by Kamehameha III, "e hiki ke lawe aku imua o ka Poe Hoona Kuleana (translation: take it before the Land Commission)."

In addition to the directive given to the Konohiki, Native Tenants were also encouraged to file their claims with the Land Commission before the February 14th deadline. On January 4, 1848, Reverend Hitchcock, who was very concerned about the deadline for natives to file their claims, asked Chief Justice William Lee, who was also serving as the President of the Land Commission, if the deadline could be extended. Lee responded on the 14th,

> I agree with you that the subject of prolonging the time for sending in land claims is worthy of serious consideration, and I will take the first opportunity to bring it before the King in Privy Council. The tenants however, will not lose their rights should they fail to send in their claims, for I will see that no Konohiki has a title to lands except upon the condition of respecting the rights of tenants. Still, it is necessary that the tenants should send in their claims, in order that their rights may be separated

[237] W.D. Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," Interior Department, Appendix 1 to Surveyor General's Report (1882), 13-14.

[238] *Id.*

> from those of the Konohiki, and they know what rights they really have.[239]

These claims that managed to get filed were for the purpose of granting fee-simple titles to the commoners. The Land Commission at the time, however, was not authorized to grant titles, but only authorized to investigate claims to titles. The Land Commission would soon receive authorization to act on behalf of the King and Chiefs to grant fee-simple titles according to the rules of the Māhele. This is what prompted Privy Council Resolution dated December 21, 1849, whereby the King and Chiefs would allow "fee-simple titles, free of commutation, be and hereby granted to all native tenants" with certain conditions. The following year on August 6, 1850, the Legislature amended the role of the Land Commission whereby "the board of commissioners to quiet land titles be, and is hereby empowered to award fee-simple titles in accordance with the foregoing [Privy Council] resolutions." This statute has come to be known as the Kuleana (Fee-simple) Act.

For those Native Tenants that needed additional lands, the statute provided "a certain portion of government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre." The following year on June 16, 1851, the Legislature passed *An Act to Provide for the Appointment of Agents to Sell Government Lands to the People* to facilitate this process already set-in motion by the 1850 Kuleana Act. These lands "from one to fifty acres" were for those Natives that were unable to file their claims with the Land Commission by February 14, 1848.

The vested rights of the Government class was vested in one government, and the vested rights of the Konohiki class was vested in 253 Konohikis, which included Kamehameha III, and were identified in the Māhele book. The vested rights, however, of the Native Tenant class is infinite in number because it is not vested in the name of certain people in the class unlike the Konohiki class but includes future generations of Native Tenants. As stated by the Hawaiian Supreme Court, in *Kekiekie v. Dennis*,

> …the people's [rights in the] lands were secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself. The King cannot convey a greater title than he has, and if he grants lands without reserving the claims of tenants, the grantee must seek his remedy against the grantor…[240]

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[239] "Letter dated Jan. 4, 1848," *Supreme Court Letter Book of Chief Justice Lee, June 3, 1847-April 18, 1854*, Judiciary Dept., series 240, box 1, Hawaiian Archives.

[240] *Kekiekie v. Edward Dennis*, 1 Haw. 69, 70 (1851).

For those Konohiki in the Māhele that also failed to file their claims with the Land Commission, the Legislature enacted in 1854 *An Act for the Relief of Certain Konohikis* that extended the time to file with the Land Commission. And when the Land Commission was dissolved in 1855, those Konohiki that did not file were then authorized to file their claims with the Minister of the Interior under *An Act for the Relief of Certain Konohikis, whose Names Appear in the Division of Lands from Kamehameha III* (1860).

In the 1882 report by the Surveyor General, he noted that Kamehameha III "showed his deep sympathy with the wants of his people, and set an illustrious example of liberality and public spirit …[and the] whole transaction was a severe test of their patriotism, and reflects great credit on that Hawaiian aristocracy which thus peacefully gave up a portion of its hereditary rights and privileges for the good of the nation."[241] These statutes also show the liberality with which the Hawaiian government was extended to both the chiefly class and the commoner class.

The Surveyor General also reported that between "the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives."[242] Donovan Preza, in his M.A. thesis on the Great Māhele (2010) tallied the number of acreage acquired by the Native within this ten year period to be a remarkable 111,448.36 acres.[243] This number of acreage is in addition to the 28,658 acres that Natives acquired from the Land Commission that Kame'eleihiwa and Osorio hang theirs hats on as their sole evidence of oppression. By 1893, Natives acquired from the government a total of 167,290.45 acres. This is not evidence of dispossession and oppression of the commoners by the aristocracy and missionaries as argued by the movement of Hawaiian indigeneity.

Preza's thesis not only rebukes Kame'eleihiwa's conclusions, which is reflected in its title, *The Emperical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848*, but also undermines Osorio's reliance on Kame'eleihiwa's so-called travesty of the Māhele upon the Natives. What is ironic, to say the least, is that the very Legislature that Osorio accuses of dismemberment was in fact responsible for facilitating the acquisition of lands for those Natives that were not able to file their claim with the Land Commission. What Osorio fails to mention in his book is that it was practice for the House of Representatives to publish a report of their work in the government newspaper, *The Polynesian*.

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[241] Alexander, 16-17.

[242] *Id*., 24.

[243] Preza, 141.

In its address "To the Makaainana of the Hawaiian Islands," dated June 28, 1851, all twenty-four Representatives begin with, "We, the undersigned, Representatives of the People, feeling it our duty to render an account of the manner in which we have discharged the trust reposed in us, hereby submit to you a summary of the laws, passed during the last session of the Legislature, which we consider of most interest to the People at large." In particular, they stated:

> We have passed an Act for the appointment of agents, in every district where there are Government lands for sale, whose duty it shall be to sell lands to the Makaainanas residing in such districts, in lots of from one to fifty acres, at a minimum price of fifty cents per acre.
>
> Hereafter, there can be but little doubt that each man, not already provided with sufficient land, will become possessed of a small farm. Save your money then, and improve the opportunity, now afforded, of purchasing a homestead for yourselves and families. Those of you who have no kuleanas (fee-simple), or who have neglected to send in your claims, to the Land Commissioners, must not fail to avail yourselves of this privilege.[244]

From an academic standpoint, if scholars carefully read Kameʻeleihiwa's book, they would have seen a glaring red flag that would raise serious concern as to the veracity of her conclusions. Her book is her doctoral dissertation out of the History Department at the University of Hawaiʻi at Mānoa. In her publication, Kameʻeleihiwa writes, "To those members of the History department who refused to sign off on my 'brilliant' dissertation, let the *Lāhui* decide who is more skilled in their profession. Soon young Hawaiians—my students—will rise to assume your positions as you fade into the obscurity of footnote trivia."[245] This prompted me to retrieve a copy of her dissertation from the University of Hawaiʻi's Hamilton Library and to my amazement two of the committee members, who were tenured in the History Department—Professors Pauline King and Edward Beechert, did not sign off on the dissertation. What was more concerning was that Professor King was the chair of her committee.[246] She, by the way, was part aboriginal Hawaiian.

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[244] House of Representatives, "Address to the Makaainana of the Hawaiian Islands," *The Polynesian*, June 28, 1851, 26, accessed January 17, 2021, https://chroniclingamerica.loc.gov/data/batches/hihouml_lilac_ver02/data/sn82015408/00237289687/1851062801/0254.pdf.

[245] Kameʻeleihiwa, xvi.

[246] Cover and signature page, Lilikalā Dorton, "*Land and the Promise of Capitalism: A Dilemma for the Hawaiian Chiefs of the 1848 Māhele"* (PhD diss., University of Hawaiʻi at Mānoa, 1986), ProQuest Dissertations & Thesis. Cover and signature pages, accessed January 17, 2021, http://www2.hawaii.edu/~anu/pdf/Dissertation_Signatures_(Dorton).pdf.

I have sat and currently sit on doctoral committees at the University of Hawai‘i at Mānoa, and if a situation should arise where one of the committee members refuses to sign off on a dissertation, the doctoral candidate would still be able to get the Ph.D. degree. But if the chair refuses to sign off, the doctoral student will not get a Ph.D. degree. This begs the question as to how Kame‘eleihiwa, who was previously known in the doctoral program as Lilikalā Dorton, got a Ph.D. degree and later tenure at the University of Hawai‘i? It has been revealed to me by a retired professor at the university that the chair refused to sign off on the dissertation because it was not based on facts but rather opinions. Krystyna Aune, Dean of Graduate Division at the University of Hawai‘i at Mānoa this past summer stated to me that the graduate policies in 1986 did allow the granting of a Ph.D. degree without the signature of the chair. From an academic standpoint, however, Kame‘eleihiwa’s book should be seen as a mockery of the academy.

Now that these two publications, which buttresses Hawaiian indigeneity, have been falsified, this particular discourse collapses. Where is the oppression of the Hawaiian people! After returning home from the PCA, it was decided by the Council of Regency, which represented the Hawaiian Kingdom in the *Larsen* case and that since I already had a B.A. degree in Sociology in 1987 from the University of Hawai‘i at Mānoa where I was familiar with what was being taught, that I would enter the Political Science graduate program to engage this false information with critical research and analytical rigor. I and other graduate students formed HSLP to encourage multidisciplinary research into Hawai‘i’s past and to revisit commonly understood historical facts. Professor Kanalu Young was our faculty advisor and author of two articles in the HJLP. These publications and research prompted historian Tom Coffman to revise the title of his book on annexation in 2009. He explained:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with its takeover of Hawai‘i. In the book’s subtitle, the word *Annexation* has been replaced by the word *Occupation*, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, “The challenge…for the fields of political science, history, and law is to distinguish between the rule of law and the politics of power.” In the history of Hawai‘i, the might of the United States does not make it right.[247]

[247] Coffman, xvi.

Notwithstanding, countless academics continue to cite Kameʻeleihiwa's and Osorio's publications and treat them as historical facts. Neither have corrected their publications after becoming aware of their misinterpretations and miscalculations. That was thirteen years ago and there has been no change in the curriculum at the University of Hawaiʻi at Mānoa. Osorio is now Dean of Hawaiʻinuiākea—School of Hawaiian Knowledge that oversees the University of Hawaiʻi at Mānoa's departments of Hawaiian language and Hawaiian Studies. Its mission is supposed "to pursue, perpetuate, research, and revitalize all areas and forms of Hawaiian knowledge."

Despite Osorio's failure to directly address in writing—like Coffman and the matter of occupation—his misinterpretations of the Great Māhele and the 1851 House of Representatives in his book *Dismembering Lāhui*, he did, to his credit, speak to this issue in an online webinar celebrating Lā Kūʻokoʻa (Hawaiian Independence) on November 28, 2020. He admitted that the Māhele was "done to protect the hoaʻāina, the makaʻāinana, the people of the land who are not chiefs; to protect their existence on the land, and this is one of the most amazing things about the Māhele, and *it was something that I didn't really understand when I wrote my book*. It was something that, really…Professor Keanu Sai makes clear to all of us. (emphasis added)."[248]

Those that espouse Hawaiian indigeneity have not made any course correction like Coffman and Osorio. Instead, they've doubled down on a fabricated oppression of natives in the Hawaiian Kingdom. Their rhetoric is loose and diffuse. They don't use "settler colony in a formal and political sense," which derives from the doctrine of discovery, but rather subjectively use it to embolden their rhetoric through communal reinforcement. These academics have lost sight of the proper use and application of the term's colony and colonization and have remained steadfast in their false conclusion that the American presence in the Hawaiian Kingdom was and continues to be colonial in nature. Because the United States treated the Hawaiian Kingdom "after" 1893 as an insular possession does not make it an American colony.

By erroneously identifying the Hawaiian Kingdom as an extension of the American colonial empire it has generated much confusion in the way of legal and political solutions in light of Hawaiʻi's status as an independent, but occupied, State. Zizek critically suggests that in post-colonial studies, the use of the term colonization "starts to function as a hegemonic notion and is elevated to a universal paradigm, so that in relations between the sexes, the male sex colonizes the female sex, the upper class colonizes the lower classes, and so on."[249] In cultural studies, he argues that it

[248] NDN Collective, "Landback Now: Hawaiian Kingdom," interview of Dr. Jon Osorio, November 28, 2020, video, 48:07, accessed on January 17, 2021, https://www.facebook.com/ndncol/videos/207958127499343/.

[249] Slavoj Zizek, *Interrogating the Real* (New York, Continuum, 2005), 92.

"effectively functions as a kind of *ersatz*-philosophy, and notions are thus transformed into ideological universals."[250] *Ersatz* is German for "imitation or substitute."

In international humanitarian law, this intentional obliteration of the Hawaiian Kingdom's institutions and its national consciousness through the teachings of Hawaiian indigeneity takes on a serious tone. Hawaiian indigeneity, as an intentional act, would give rise to criminal culpability as to the war crime of *denationalization*. According to Schabas, *denationalization* is one of the war crimes currently being committed in Hawai'i, which are "actions directed at the destruction of the national identity and national consciousness of the population [of the Hawaiian Kingdom]."[251] Schabas provides the requisite elements for such a crime as:

> 1. The perpetrator participated in the imposition or application of legislative or administrative measures of the occupying power directed at the destruction of the national identity and national consciousness of the population.
> 2. The perpetrator was aware that the measures were directed at the destruction of the national identity and national consciousness of the population.
> 3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
> 4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.[252]

With regard to the last two elements, Schabas states:

> 1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict as international [...].
> 2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international [...].
> 3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict [...].[253]

The critical theorist of Hawaiian indigeneity is disarmed and their subjective conclusions as to race, gender and western oppression have no legs to stand on in the Hawaiian Kingdom. To erroneously call aboriginal

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[250] *Id.*

[251] Schabas, "War Crimes Related to the United States Belligerent Occupation," 161.

[252] *Id.*, 168.

[253] *Id.*, 167.

Hawaiians indigenous people that reside within the United States would be tantamount to calling Palestinians an indigenous people residing within the Israeli State. Even more outlandish would be calling aboriginal Tongans, who comprise the majority of the Kingdom of Tonga's national population, an indigenous people whose rights are envisaged in the United Nations Declaration of Rights of Indigenous Peoples.

The Hawaiian Kingdom, Palestine, and Tonga are independent States, not tribal nations. Unlike Tonga, the Hawaiian Kingdom and Palestine are not member States of the United Nations. However, there is no international custom that independent States are obliged to be members of the United Nations, which is an intergovernmental organization. The United States was not a member of the United Nations' predecessor, the League of Nations, and Switzerland did not become a member of the United Nations until 2002.

## XIV. CLOSING REMARKS

Critical theorists, however, can still march under the banner of emancipating the oppressed by critiquing institutions of authority that arose "after" the overthrow of the government of the Hawaiian Kingdom on January 17, 1893, which were founded on racial and gender inequality. If critical theorists make a course correction, they will find that aboriginal Hawaiians, as protected persons under international humanitarian law, like Palestinians, affords them rights and access to mechanisms of redress that are not available in an indigenous discourse.

In closing, I would like to restate a quote from my law article in 2008 titled *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today* that was as relevant then as it is now.

> It is crucial at this stage to continue this type of research so that eventually Hawai'i and the world community at large will have a clearer understanding of these historical events and the profound impact it has today. Rather than focusing attention on reconciling the present, resources and efforts should be redirected in order to develop and foster a reckoning of Hawai'i's history—a reconciliation of the past. Thus, Professor Young advocates "a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity." The challenge for other scholars and practitioners in the fields of political science, history and law is to distinguish between the rule of law and the politics of power. Rigorous and diligent study into the Hawaiian-American situation is not only warranted by the current legal and political challenges facing Native Hawaiians…, it is a matter of what is right and just. The

> ramifications of this study cannot be underestimated, and its consequences are, no doubt, far-reaching. They span from the political and legal to the social and economic venues situated in both the national and international levels. Therefore, in light of the severity of this needed research, analytical rigor is at the core and must not fall victim to political affiliations, partisanship or just plain bias.[254]

If academics continue to teach Hawaiian indigeneity, which attempts to obliterate the national consciousness of the Hawaiian Kingdom, in courses at the universities and colleges throughout the Hawaiian Islands and abroad, aside from incurring criminal culpability under international law for the war crime of denationalization, a signficant and quick measure of accountability would be for students to not enroll in these classes. Students, who pay college tuition, should be assured that revisionist history is not coursework at the collegiate level unless the course itself is called "Revisionist History of Hawai‘i post-1893." As Patrick Moynahan once stated, "you are entitled to your own views, but you are not entitled to your own facts."[255]

[254] Sai, "Slippery Path," 133.

[255] Patrick Moynihan, "More Than Social Security Was at Stake," *The Washington Post*, January 18, 1983.