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"CONSTITUTIONAL LAW OF THE HAWAIIAN KINGDOM"

I. INTRODUCTION

Why is it that when you mention constitutional law in 19th century Hawai`i, responses are pejoratively dismissive by contemporary scholars? Merry asserts that as "foreigners developed and ran these new bureaucratic systems of law and government, they defined the Hawaiian people as incapable (2000: 89)." Levy wrote "Westerners, with their access to capital, [were put] in a position to take Hawaiian lands through the legal procedures they had established…[and] Western Imperialism had been accomplished without the usual bothersome wars and costly colonial administration (1975: 857)." And Stauffer argued that "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 (2004: 73)." These statements are paradoxically superficial and ambiguous at best, and have more to do as a response to power and colonialism than they do with constitutionalism. And they fall short in *explaining* Hawaiian governance and the relationship of departments and agencies within the broader view of public law and administration. Although, many scholars make reference to 19th century law, none, to date, have directed their research on the topic of Hawaiian governance that employs appropriate constitutional theory, e.g. constitutional monarchy, citing of judicial decisions and statutes regarding the Hawaiian constitution, or any reference made to books of authorities as sources of Hawaiian constitutional law utilized by governmental officials of the Hawaiian Kingdom.

A cursory view of the constitution and laws identify seven (7) key institutions that formed the basis of Hawaiian governance—the Legislative Assembly, the Monarch, the Nobles, the Representatives, the Cabinet, the Privy Council of State, and the Supreme Court. In this proposal I would like to be able to provide as logical and complete an exposition of the political institutions and general principles of Hawaiian governance in the 19th century as possible. Within this context, I hope to be able to explain the processes by which legislative enactments, executive policies, and judicial reasoning took place, which would consist of a systematized arrangement of these institutions and the relations they bore to one another and to the general doctrines of Hawaiian law. Read as an outline, this proposal highlights, in brief narrative paragraphs, the basic elements of my research, how it will be conducted, and what key points it will focus on throughout the dissertation once completed. Accordingly, my research results could very well serve as a guide for future research on this important time period.

II. HISTORICAL CONTEXT

Kamehameha I was the founder of the Hawaiian Kingdom and established a monarchical government of the Hawaiian Islands in 1810 that constituted twelve (12) islands. He ruled from April 1810 until his death in May 1819. Upon his death, his son Liholiho ascended

to the throne as Kamehameha II and ruled the kingdom from May 8, 1819 to July 1824 when he died of measles in London. His brother Kauikeaouli, the second son of Kamehameha I, then ascended to the throne as Kamehameha III. The Hawaiian Kingdom was governed until 1838 without formal legal enactments, based upon an unwritten constitution that consisted partly of the ancient kapu and the practices of the celebrated Chiefs passed down by tradition (Statute Laws 1846: 3).

The Declaration of Rights, proposed and signed by King Kamehameha III on June 7, 1839, was the first essential departure from the ancient ways. It recognized three classes of persons in the kingdom having vested rights in the lands; first**,** the King; second**,** the Chiefs; and third, the Tenants. It declared protection of these rights to both the chiefly and tenant classes (Statute Laws 1847: 83). These rights were not limited to the land, but included the right to "life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of the laws (Lydecker 1916: 8)."

On October 8, 1840, King Kamehameha III voluntarily relinquished his absolute powers and attributes by promulgating a constitution that recognized three grand divisions of a constitutional monarchy; the King as Chief Executive, the Legislature, and the Judiciary. The Legislative department was composed of the three Estates in the kingdom, the King, the Nobles, and the Representatives—each having a negative on the other. The Government was established to protect and acknowledge the rights already declared by the 1839 Declaration of Rights. The Constitution generally defined the duties of each branch of government. The laws embraced the rights and duties of the social relations between the three Estates, and initiated the internal development of the country with the promotion of industry and commerce. These laws declared the fundamental basis of landed tenure, and the usufruct of the soil was encouraged by relaxing the vassal service of the chiefly and tenant classes.

As Hawaiian governance began to evolve under the written constitution, King Kamehameha III, in Privy Council, dispatched a Hawaiian delegation to the United States

and then to Europe with the power to settle alleged difficulties with nations, negotiate treaties and to ultimately secure the recognition of Hawaiian independence by the major powers of the world. In accordance with this view, Timoteo Ha`alilio, William Richards and Sir George Simpson were commissioned as joint Ministers Plenipotentiary on April 8, 1842 (Thrum 1893: 46). Sir George Simpson, shortly thereafter, left for England via Alaska and Siberia, while Ha`alilio and Richards departed for the United States via Mexico on July 8, 1842 (Ibid).

While in the United States, the Hawaiian delegation specifically requested formal acknowledgement of the Hawaiian Kingdom "as a sovereign and independent State" from U.S. Secretary of State Daniel Webster (Ha`alilio & Richards 1895 [1842]: 42). Thereafter, the delegates were able to secure the assurance of U.S. President Tyler's recognition of Hawaiian independence, and then proceeded to meet Sir George Simpson in Europe to secure formal recognition from Great Britain and France. On March 17, 1843, King Louis-Phillipe of France recognized Hawaiian independence. The following month, on April 1, Lord Aberdeen, on behalf of Her Britannic Majesty Queen Victoria, assured the Hawaiian delegation that "Her Majesty's Government was willing and had determined to recognize the independence of the Sandwich Islands under their present sovereign (Thrum 1893: 46)."

On November 28, 1843, at the Court of London, the British and French Governments entered into a formal agreement of the recognition of Hawaiian independence. The Anglo-Franco Proclamation read:

> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands (Hawaiian Islands) of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands as an Independent State, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed [emphasis added] (Hawaiian Almanac 1893: 68).

As a sovereign State, the Hawaiian Kingdom entered into extensive diplomatic and treaty relations with other States.[1] In particular, five treaties with the United States of America: December 20, 1849,[2] May 4, 1870,[3] January 30, 1875,[4] September 11, 1883,[5] and December 6, 1884.[6] The Permanent Court of Arbitration in 2001 also concluded, "that in the 19th 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 (Permanent Court of Arbitration 2001: 581)."

III. MOTIVATION AND RELEVANCE

The key to state sovereignty in the 19th century was "external sovereignty [that] consists in the independence of one political society, in respect to all other political societies (Wheaton 1936 [1836]: 27)," and through recognition this independent sovereign authority is acknowledged to the exclusion of other independent and sovereign authorities that comprise the community of states. Kent, the leading American authority of the time, observed that states "are equal…whatever may be their relative dimensions or strength, or however greatly they may differ in government…[and] it is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government…or a course of internal policy, to another (1873 [1823]: 21)."

[1] Great Britain (Nov. 16, 1836 and July 10, 1851), The Free Cities of Bremen (Aug. 7, 1851) and Hamburg (Jan. 8, 1848), France (July 17, 1839), Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Germany (March 25, 1879), France (Oct. 29, 1857), Japan (Aug. 19, 1871), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 16, 1862), Russia (June 19, 1869), Samoa (March 20, 1887), Switzerland (July 20, 1864), Spain (Oct. 29, 1863), Sweden and Norway (July 1, 1852). These treaties can be found in their original form at the Hawai`i State Archives, Honolulu, Hawaiian Islands.

[2] 9 Stat. 178. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115-122.

[3] 16 Stat. 1113. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 123-125.

[4] 19 Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126-128.

[5] 23 Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129-133.

[6] 25 Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134-135.

Within fifty years, the Hawaiian Kingdom developed a complete system of laws, both civil and criminal, amended its organic law under three constitutions, reformed its land tenure, increased its territorial dominion to include sixteen (16) islands under the *doctrine of discovery*, and administered over ninety (90) legations and consulates throughout the world (Thrum 1893: 140-141). Was this all accomplished, as Stauffer suggests, by an "American dominated" government posing as an independent state, or was it a result of self-determination and self-governance?

As a result of the United States intervention in 1893 and subsequent unilateral annexation in 1898 of the Hawaiian Islands during the Spanish-American War, the Hawaiian Kingdom, as an independent state, has remained silent on the international plane for over a century. The locus of contemporary scholarship regarding 19th century Hawai`i has been situated within the milieu of the American state, with all its recognized vices (e.g. hegemon, colonizer, world superpower), and views the Hawaiian Kingdom as a vanquished aspirant that ultimately succumbed to U.S. power. Recent works as *Colonizing Hawai`i: the Cultural Power of Law* (Merry 2000), *Dismembering Lahui [the Nation]* (Osorio 2002), and *Kahana: How the Land was Lost* (Stauffer 2004) evidences this paradigmatic view of the Hawaiian Kingdom as a forgone conclusion and a subject of critique.

However, since the Lance Larsen vs. Hawaiian Kingdom arbitration (1999-2001) in The Hague, Netherlands, international attention has been garnered and has begun to shift the paradigm from an intra-state to an inter-state point of view—as between two internationally recognized political units.[7] As the Hawaiian state gains more attention and scholarship as a subject of international law, a comprehensive overview of its 19th century

[7] Works on this topic include, *Lance Paul Larsen v. the Hawaiian Kingdom* (Bederman & Hilbert 2001), *Continuity of the Hawaiian Kingdom* (Craven 2004 [2002]), *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law* (Dumberry 2002), *American Occupation of the Hawaiian State: A Century Gone Unchecked* (Sai 2004*), An Interdisciplinary Study of the term "Hawaiian"* (Young 2004), *Hawai`i, History, and International Law* (Craven 2004*),* and *Ku`e and Ku`oko`a: History, Law, And Other Faiths* (Osorio 2004).

government and its institutions is necessary so that misinterpretations of Hawaiian governance can be reframed and corrected.

A. Kuykendall's Misinterpretation of the Promulgation of the 1864 Constitution by King Kamehameha V

Consider Kuykendall's interpretation of the abrogation of the 1852 constitution and the promulgation of the 1864 constitution by Kamehameha V in his book *The Hawaiian Kingdom, 1854-1874* (1953). It was an action he branded a *coup d'état*. In French *coup d'état* is a stroke of the state or blow to the government: in the vernacular of politics it connotes the unlawful takeover of governance. When the delegates of the constitutional convention of 1864 were unable to agree on certain provisions regarding suffrage, Kamehameha V dissolved the convention with the following speech:

> I am very sorry that we do not agree on this important point. As I said the other day, this [voting] is not a right belonging to the people, as some have here said. I have told you, and my Ministers also have told you, that in all other monarchical countries suffrage is limited, and it is thought that the possession of property is proof of industry and thrift, therefore in those enlightened countries it is said that the class who possess property are the proper persons to advise their Representatives in regard to the necessities of the Government, and the poor, lazy, and ignorant are debarred from this privilege.
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> It is clear to me if universal suffrage is permitted, this Government will soon lose its Monarchical character…
>
> As we do not agree it is useless to prolong the session, and as at the time His Majesty Kamehameha III gave the Constitution of the year 1852, He reserved to himself the power of taking it away if it was not for the interest of his Government and people, and as it is clear that that King left the revision of the Constitution to my predecessor and myself therefore as I sit in His seat, on the part of the Sovereignty of the Hawaiian Islands I make known today that the Constitution of 1852 is abrogated. I will give you a Constitution (Kuykendall 1953: 131-132).

Central to Kuykendall's thesis is that Kamehameha V's action was not constitutional and/or legal, but unconstitutional and illegal—a serious accusation upon a country's head of state by a scholar. He wrote, "Hawaiian sovereigns believed they had the right to change the constitution at will…[and] Kamehameha V acted upon that belief (Ibid: 117)." Throughout his chapter on the constitution he was unable to "answer the question

as to whether the king could take away the constitution that had been granted by him or his predecessor (Ibid)," and concluded that by "his *coup d'état*, the king had accomplished his purpose to make 'the influence of the Crown' pervade 'every function of the government' (Ibid: 133)."

When Kamehameha V dissolved the convention he stated that the 1852 constitution "reserved to [the King] the power of taking [the constitution] away if it was not for the interest of his Government and people." Was Kamehameha V delusional in his statement to the members of the convention, or did the 1852 constitution actually provide the authority spoken of in his speech? A careful reading of the constitution itself answers the question, and illuminates three very important provisions that speak directly to authority to alter or change Hawaiian governance.

> **Article 39.**
> The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can, place the whole Kingdom, or any part of it under martial law; and he can ever alienate it, if indispensable to free it from the insult and oppression of any foreign power.
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> **Article 45.**
> All important business for the Kingdom which the King chooses to transact in person, he may do, but not without the approbation of the Kuhina Nui. The King and Kuhina Nui shall have a negative on each other's public acts.
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> **Article 105.**
> Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of the members of each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the next Legislature; which proposed amendment or amendments shall be published for three months previous to the election of the next House of Representatives; and if, in the next Legislature, such proposed amendment or amendments, shall be agreed to by two-thirds of all the members of each house, and be approved by the King, such amendment or amendments shall become part of the Constitution of this Kingdom.

The last article obviously speaks to the sole authority of the Legislature to amend the constitution, but the former two articles speak to the authority of the King, without the requirement of legislative approval to, first, "alienate" the entire kingdom for cause, and, second, to transact "important business for the kingdom." Kamehameha V and his

predecessor, Kamehameha IV, recognized these two articles, together with article 94—which did not require the King to take the oath of office unless he approved the constitution first, as a hindrance to responsible government. These anomalous provisions formed the basis and reasoning of the King to convene the constitutional convention to draft a new constitution and not to amend the former.

In his speech at the opening of the Legislative Assembly of 1864, Kamehameha V explained his action of abrogating the 1852 constitution and proclaiming a new constitution by making reference to the "forty-fifth article [that] reserved to the Sovereign the right to conduct personally, in cooperation with the Kuhina Nui (Premier), but without the intervention of a Ministry or the approval of the Legislature, such portions of the public business as he might choose to undertake (Lydecker 1918: 99)." These provisions were removed from the 1864 constitution by eliminating the office of Kuhina Nui, requiring the Monarch to take the oath of office upon ascension to the throne, and placing the sole authority to amend or alter the constitution upon the Legislative Assembly, which was now a unicameral body.

A special committee was appointed by the 1864 Legislative Assembly to respond to the King's speech. The committee, which was comprised of Godfrey Rhodes, John I`i, and J.W.H. Kauwahi, acknowledged the constitutionality of the King's prerogative under the former constitution and stated with appreciation and gratitude,

> this prerogative converted into a right by the terms of the [1852] Constitution, Your Majesty has now parted with, both for Yourself and Successors, and this Assembly thoroughly recognizes the sound judgment by which Your Majesty was actuated in the abandonment of a privilege, which, at some future time might have been productive of untold evil to the nation (Legislative Reply 1864).

As recognized, this constitutional prerogative was removed from the 1864 Constitution, thereby effectively obviating the right of any future Monarch to alter the constitution without the approval of two-thirds of all members of the Legislative Assembly as provided under article 80.[8] But Kuykendall did not mention these three articles of the

[8] Article 80 states: "Any amendment or amendments to this Constitution may be proposed in the Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof, such

1852 constitution, the King's speech to the 1864 Legislature, or the response of the legislative committee acknowledging the constitutionality of Kamehameha V's deed. Instead, he critiques the actions of the King and his cabinet solely upon his mistaken assumption that only the legislature was constitutionally vested with the authority to alter the constitution, and renders the actions taken by the King as a *coup d'état.* Contemporary scholarship has accepted this view without question.

Kuykendall's judgment was completely misplaced and unfounded based on the evidence presented here, but ironically he provides a basis to justify the constitution that was signed by King Kalakaua on July 6, 1887 at the point of a bayonet, whereby aliens were allowed to vote for a new Legislative Assembly. It was implied that if Kamehameha V could proclaim a new constitution then why could not Kalakaua, regardless of process. The fact of the matter is, Kamehameha V did have the constitutional authority under article 45, but since it was removed the Monarch was limited to the execution of law and no longer able to unilaterally enact laws on his own without legislative approval. This was an epic event in the formation of Hawaiian constitutionalism, and not the action of a despot as Kuykendall proposes. The so-called 1887 constitution never received legislative approval, but rather was a revolutionary act on the part of those who forced it upon Kalakaua, that "provided for a special election to be held within ninety days so as to create a new legislature to take the place of the one chosen in 1886 (Andrade 1996: 51)." Thurston, the leader of the *coup*, exclaimed, "unquestionably the [1887] constitution was not in accordance with law…[and] had to be forcibly effected and forcibly maintained (1936: 153)," and Judd, who served as Chief Justice of the Hawaiian Kingdom Supreme Court at the time, admitted in 1893 to U.S. Special Investigator James Blount that the 1887 constitution "was considered a revolution (Blount 1895 [1893]: 837)." Therefore, as

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proposed amendment or amendments shall be entered on its journal, with the yeas and nays taken thereon, and referred to the next Legislature; which proposed amendment or the next election of Representatives; and if in the next Legislature such proposed amendment or amendments shall be agreed to by two-thirds of all members of the Legislative Assembly, and be approved by the King, such amendment or amendments shall become part of the Constitution of this country."

a revolutionary act it will be interpreted according to the constitutional *doctrine of necessity*,[9] and not assumed to be a part of the public law of the Hawaiian Kingdom.

Responsible government was the theoretical foundation embodied in the 1864 constitution, where "no act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible (Lydecker 1918: 92)," and that the Ministers were responsible to the Legislative Assembly and could be impeached "for misconduct or maladministration in their offices (Ibid: 94)." This information not only falsifies Kuykendall's claim of a *coup d'état* in 1864, but it also undermines a major theory of contemporary scholarship that the 1864 constitution increased the powers of the monarch. The *coup d'état* occurred in 1887, not in 1864, and this *coup* served as the fulcrum for the 1893 United States armed intervention and ultimate seizure of the Hawaiian Islands for military and strategic purposes. Kuykendall's scholarship came at a time when the Hawaiian Islands were controlled as an insular possession under the U.S. Presidency. As an American citizen, his political orientation was republican and definitely not monarchical, which could explain his misinterpretation. Post-1893 scholarship regarding the Hawaiian Kingdom has been plagued by *presentism* that reinforces the present with the past, and Olafson warns that "by tying interpretation so closely to the active and parochial interests of the interpreter…[it] has opened the door to a willful exploitation of the past in the service of contemporary interests (1972: 719)."

B. *Contemporary Scholarship Regarding Hawaiian Governance*

To date, there are only four academic writers who extensively engaged the topic of Hawaiian governance in the 19th century. Henry E. Chambers, *Constitutional History of Hawai`i (1896)*, Ralph S. Kuykendall, *Constitutions of the Hawaiian Kingdom* (1940) and *The Hawaiian Kingdom, vol. 2, 1854-1864* (1953), Sally Merry, *Colonizing Hawai`i:*

[9] Lord Pearce in his dissenting judgment stated, "I accept the existence of the principle [of necessity] that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign." *Madzimbamuto (Appellant) and Lardner-Burke & George (Respondents)*, The Law Reports, Appeal Cases 1 (1969): 732.

The Cultural Power of Law (2000), and Jonathan K. Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (2004). Absent in all these works is the employment of applicable constitutional theory, and judgments and interpretations were left with the authors themselves, dependent upon their varied points of view and loci of enunciation.

Chambers, who was a racist republican and an American apologist for the revolutionaries of 1893, portrayed Kamehameha III as a savage chief. He stated, that the King's promulgation of the "constitution [of 1840] was purely a concession upon his part, and the motive which actuated him in making the concession was no doubt the impulse to ape and imitate which lower races seem as a rule to possess (1896: 13)." But Chambers depicted Sanford Dole, a traitor to the Hawaiian Kingdom (Cleveland 1895 [1893]: 458), as a man with "extraordinary good judgment…who, in some of the most critical of situations…seems to have done exactly the right thing at the right time, using power entrusted to him with rare wisdom and unselfishness (Ibid: 38)." Merry, whose framework is colonial/post-colonial theory employed an ethnographic approach that framed 19th century Hawai`i into an *imperialistic* dichotomy of conflicting cultures and people. Consistent with this ethnographic view was Osorio, who concluded that "the government 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 (2002: 257)," because the system itself was foreign and not Hawaiian. And Kuykendall, who was an historian by profession, never claimed to be a constitutional scholar. This is all the more reason, given the varied points of view and misinterpretations of Hawaiian governance, to fill this void and to clarify the 19th century legal and political framework as it existed prior to July 6, 1887, the date of the revolution.

IV. RESEARCH QUESTIONS

As previously stated, there were seven (7) key institutions that formed the basis of Hawaiian governance prior to July 6, 1887—the Legislative Assembly, the Monarch, the Nobles, the Representatives, the Cabinet, the Privy Council of State, and the Supreme Court. How did each of these institutions relate with one another? What were the general

principles aligned with Hawaiian constitutionalism—especially as a monarchy? What was the organization of the State and where did sovereignty lie? What was the source and guarantee of individual liberties in the Hawaiian constitution? How was the will of the State expressed? And, finally, what was the organization of the executive, legislative, and judicial branches of government in the context of both day-to-day and extraordinary administrative functions?

V. METHODOLOGY

The Hawaiian Kingdom was democratic in process, but not republican in form, and bore a striking resemblance to Hegel's theory of constitutional monarchy envisaged in his treatise *Philosophy of Right* (1942 [1821]). This is not a mere theoretical difference, but an institutional difference that is vital in the framing of the research. Therefore, in order to explain the processes by which legislative enactments, executive policies, and judicial reasoning took place within a constitutional monarchy prior to the revolution, there must be a clear understanding of the public law as distinguished from private law. The latter being "administered between citizen and citizen (Black 1968: 1359)," while the former "is concerned with the state in its political or sovereign capacity (Ibid: 1394)."

Goodnow, in his Presidential address to the American Political Science Association, emphasized that "the study of public law is a particularly necessary part of Political Science…[because] it is only by a study of the law, sometimes a most detailed study, that we can arrive at an accurate idea of the form and methods of a governmental system (1904: 42)." Constitutional law is a part of the domain of public law, and, according to Goodnow, it "gives the general plan of governmental organization (1893: 8)." And Phillips expounds upon the scope of constitutional law that includes, but is not limited, to

> the method of choosing the head of the State, whether king or president; his powers and prerogatives; the constitution of the Legislature; its powers and the privileges of its members; if there are two Chambers, the relations between them; the status of Ministers and the position of the civil service which acts under them; the armed forces of the State and the liability of the citizen to be called on to serve them; the relations between the central Government and local authorities to whom subordinate function of Government are delegated; the treaty-making powers, and the rules which regulate intercourse with other States; the persons who constitute the body of citizens, the terms on which foreigners may be

> admitted to its territories and the privileges which they are permitted to enjoy; the mode in which taxation may be raised and the revenues of the State may be expended; the Constitution of the Courts of justice and the tenure and immunities of the Judges; the right to demand trial by jury, and its limits; the limits of personal liberty, free speech, and the right of public meeting or association; the rights of the citizen to vote for elective bodies, central or local, and his ability to perform civic duties, such as serving on juries or aiding in the maintenance of order; and the procedure (if any) for amending the Constitution (1962: 12-13).

A. Constitutional Theory

Because the Hawaiian Kingdom's political system was reduced to written form, what historical texts can be selected as fundamental to this empirical study of the Hawaiian politic to the exclusion of other historical texts? Is there a process of selection based upon an "explicit and rational criteria of factual significance (Fischer 1970: 64)?" Einstein's famous quote that theory decides what we can observe is fundamental, for without it, the political scientist is left "running through records like rats in a maze, without even a rudimentary notion of the nature of their predicament (Ibid)." Constitutional theory appears to identify four sources fundamental to the study of constitutional law, which is the constitution itself, statutes, judicial decisions, customs and books of authority employed by the subject state (Dicey 1927; Willoughby 1929; McLaughlin 1935; Jennings 1959; Phillips 1962; Mitchell 1968; Jones 1968; Marshall 1971; deSmith 1985). In addition, sources of administrative law appear to be governmental reports from the different departments and agencies, and intergovernmental correspondences.

The constitution, statutes, court decisions, governmental reports and intergovernmental correspondences of the Hawaiian Kingdom can be retrieved for detailed study from readily available repositories here in the islands. But who were the 19th century political and legal authorities that informed Hawaiian governance? Were there any books of authority that governmental officers used to guide them in the formulation of laws, policies, and decision-making? Contemporary scholarship does not seem to think so, or at least does not make mention of it, but a careful analysis of supreme court decisions and minutes of the Privy Council clearly will show that the following books of authorities were utilized by both the judicial and executive branches of the government as early as 1845. They included Wheaton's *Elements of International Law* (1936 [1836]),

Blackstone's *Commentaries on the Laws of England* (1979 [1765]), Kent's *Commentaries on the Laws of the United States* (1873 [1826]), Stories' *United States Constitutional Law* (1987 [1833]), Montesquieu's *Spirit of the Laws* (1989 [1748]), Vattel's *Law of Nations* (1916 [1758]), High's *Treatise on Extraordinary Legal Remedies* (1874), and Cooley's *Treatise on the Law of Torts* (1993 [1880]). The Supreme Court also made mention of particular cases from the United States and Great Britain that guided them in their decisions.

B. Question of Language

Next, comes the question of language and its relation to the law, and whether or not reliance should be on the Hawaiian version, English version or a combination of both. Beginning in 1845, the laws of the Hawaiian Kingdom were published in both the English and Hawaiian languages. In the cases of Metcalf v. Kaha`i (1856), Hardy v. Ruggles *et als*. (1856), and Ha`alele`a v. Montgomery (1858), the question of whether the Hawaiian or the English version of statutes and contracts would prevail was taken up by the Supreme Court. Initially, the court limited its inquiry to the construction of a statute, and, in Metcalf v. Kaha`i, it determined "where there appeared a discrepancy between the Hawaiian and English versions of a statute, the Court adhered to the former (1856: 402)." In Hardy v. Ruggles, it explained "where there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country (1856: 463)."

Two years later, however, in Ha`alele`a v. Montgomery, the court reversed itself when a foreigner claimed to be a Konohiki (Chief) according to the Hawaiian translation of deed of conveyance he had received from Miriam Kekau`onohi, a Konohiki (Chiefess) for the ahupua`a of Honouliuli. As such, the claimant prevented native tenants access to the fishing grounds of Pu`uloa in the exercise of their piscary rights. The court concluded, that "where the exact legal signification of the terms of a deed could not be expressed in Hawaiian without great difficulty, recourse was had to the English original (1858: 63)," and refused to recognize the claimant as a Konohiki, but a tenant. The court reasoned, "To hold that the Hawaiian translation, and not the English original, should

govern…would unbar the door to endless litigation and fraud, and involve the Courts in a maze of uncertainty (Ibid: 69)."

The next year the Hawaiian Legislature concurred with the Supreme Court's position. When the Civil Code was enacted in 1859, §1493 provided, "if at any time a radical and irreconcilable difference shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding (Compiled Laws 1884: 490)." In 1864, the Legislature expanded this provision to include "any laws of the Kingdom, which have been, or may hereafter be enacted (Ibid)," and not just limited the binding nature of the English version to the Civil Code. In other words, the English version would apply to all laws enacted by the legislature since 1845.

In *Hawaiian Language Policy and the Courts* (2000), Lucas makes mention of the Hardy vs. Ruggles and Metcalf vs. Kaha`i cases, but only cites the Ha`alele`a v. Montgomery case in the endnotes, probably because it would not contribute to the thesis of his article. His argument was that since the beginning of the "Hawaiian monarchy, a steady and concerted effort was made by pro-English advocates to firmly establish English as the dominant language of the Hawaiian Islands without regard to Hawaiian (2000: 19)." Lucas' article presents an ethnographic argument that links the imposition of the English language to events that arose after the 1887 revolution. This was not the intent of the Supreme Court or the Legislative Assembly, whose actions predate the revolution, and it is also ironic that in all three of the aforementioned court cases it was the English-speaking foreigner that relied on the ambiguity of the Hawaiian translation to the detriment of those whose primary language was Hawaiian.

Since 1845, the laws enacted by the legislature were originally in English and then translated into Hawaiian (Ricord 1845: 6), but certain aspects of the land tenure—being a fundamental component of the administrative law, were originally in Hawaiian and subsequently translated into English, e.g. the Great Mahele. Therefore, in this proposal I will need to utilize both the Hawaiian and English languages and reliance on one or the other is dependent upon the subject of research.

C. Question of Interpretation of the Texts and Laws

Lastly, how does the researcher interpret these texts and laws? The area of my proposed research is over a century removed from today, and that system of government bears no resemblance to the governing system that presently exists in these Islands. It was a constitutional monarchy, not a republic, and it possessed qualities and customs "strictly adapted to its genius and traditions (Lydecker 1918: 99)." I cannot claim to know what these traditions and principles were that formed the basis of a constitutional monarchy, but as a direct descendent of Hawaiian Kingdom nationals, I have a vested interest and duty to pursue this knowledge in a responsible, professional and scholarly manner. Therefore, when interpreting historical texts, Olafson asserts that the researcher must utilize

> the author's intention as the touchstone of truth, the interpreter's function is to scour off later accretions of meaning and to prevent the prepossessions of our culture and our time from distorting our understanding of the typically very different mind and world reflected in the texts that come down to us from the past. Interpretation is thus an act of the historical imagination by which we restore a text to its author's original "horizon" of meaning (1972: 718).

Consistent with Olafson, Story, an authority in the 19th century, emphasized "the first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties (1987 [1833]: 135)." And §12 of the Hawaiian Kingdom Civil Code provided, "one of the most effectual ways of discovering the true meaning of the law…is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it (Compiled Laws 1884: 3)."

VI. CHAPTER OVERVIEW

The discourse of constitutional law relies on particular scholars and their commentaries to provide a framework within which to elaborate, critique or even provide counter-narratives. Kent, Story, Willoughby, and McLaughlin are well known constitutional scholars on United States governance, and Dicey, Philips, Jennings and de Smith are established constitutional scholars on British governance. Hawai`i, though, has none. Instead, the truncated history of Hawaiian governance in the aftermath of 1887 has

received so much attention in the latter 20th century that civil unrest politics, couched in ethnography, seemed to be the only direction of island scholars. For that reason, I would like to begin this endeavor by providing scholarly commentary on Hawaiian constitutional law, as it existed prior to the 1887 revolution.

This research will provide a desperately needed contextualization of the Hawaiian Kingdom, a unitary form of governance, before specific endeavors and inquiry can take place in the future with any hope of intelligibility, either before or in the aftermath of the 1887 revolution. Therefore, in my dissertation I will focus my efforts into four areas of research that will complement each other in the overarching theme of Hawaiian constitutional law. This will provide a broad context within which future research can be done into the specific areas of administrative law, the legislative assembly, the monarch and the central government, the judiciary, the rights and duties of the citizen, and the land tenure. As the constitution and constitutional law buttresses each of the aforementioned fields of study, from both a theoretical and practical standpoint, it is vital that the fundamental law of the country, as determined by the constitution, be the preliminary and therefore the primary subject of this research at this time.

To accomplish this, I have generally laid out the specifics of each chapter I wish to cover, that will utilize the constitution itself, statutes, judicial decisions, authorities employed by the government officials themselves, reports from the different departments and governing agencies, and intergovernmental correspondences. In addition to these formal resources, information will also be drawn from the letters of correspondences and historical accounts of the key decision makers themselves who were instrumental in the formation of Hawaiian governance. These are the primary source documents that are palpable still, and reflect the true heartbeat of a then vibrant and healthier Hawaiian Kingdom. In this sense, their story is my story, and I am but a humble conduit for its proper telling. Here follows the general layout of the dissertation that will entail a historical and theoretically based explanation of Hawaiian constitutionalism, as it existed in the 19th century prior to the 1887 revolution.

Introduction: The Nature of Constitutional Law—Before introducing the origin and nature of constitutional law in the 19th century in this chapter, the terms state, sovereignty and governance will be historically analyzed and defined. Theoretical foundations and practical applications will be discussed by elucidating the works of political philosophers that influenced governance of the time and authorities that explained governance. Some of the works to be cited include Jean-Jacques Rousseau, who distinguished the sovereignty of the state from the exercise of governance, Montesquieu, who postulated independence of the judiciary, and Hegel who advocated constitutional limitations upon the authority of the monarch. Thus it is critical to distinguish *actual* sovereignty of the state and the governmental *exercise* of that sovereignty—the latter being the subject of this research and the source of constitutional law.

Chapter 1: The History of the Hawaiian Constitution—This chapter will introduce the history of Hawaiian governance since the reign of King Kamehameha I, progenitor of the Hawaiian Kingdom, to the revolution that took place during the reign of King David Kalakaua in 1887. This chapter will look at some of the incredible changes that took place in the Hawaiian Kingdom as it evolved from absolute rule to a system of governance under a constitutional monarchy. I will also identify the key players in this process of constitutional evolution and who influenced and/or informed their decisions, whether political philosophers and authorities outside of the realm or local authorities within it. During this period three constitutions can be identified, namely in the years of 1840, 1852 and 1864, but it would be unwise to treat each constitution as if they were separate and distinct from each other. This would infer a severance in the chain of *de jure* governance and complicate the framing of the research, which is the reason why it was imperative for me to analyze the promulgation of the 1864 constitution in the beginning of this proposal and to ensure that it was not brought about through unconstitutional means.[10] Instead, these constitutions were crucial links in an evolutionary chain—a *de jure* progression of constitutionalism that culminated into eighty articles in the 1864 constitution.

[10] *Supra*, p. 7-11.

Chapter 2: An Examination of Hawaiian Constitutional Law—The focus of this chapter will identify and explore Hawaiian constitutional law as it applies to the institution of Hawaiian governance. This chapter will provide an exposition of the governmental organization of the executive, legislative and judicial branches of government as defined by the Hawaiian constitution. Unlike *Marbury v. Madison*, where the U.S. Supreme Court assumed the power to hold invalid unconstitutional acts of the Congress notwithstanding specific constitutional authority, the Hawaiian Kingdom made express provision in its laws that provided for "the Supreme Court [to] have the power to declare null and void any such law, ordinance, order or decree, as may upon mature deliberation appear to it contrary to the Constitution, or opposed to the laws of nations, or any subsisting treaty with a foreign power (Compiled Laws 1884:236)." Also in contrast to the American and Anglo theory of separation of powers, the 1864 Constitution provided that the "King, His Cabinet, and the Legislative Assembly, shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions (Article 70)." These legal relationships and the interaction amongst the different branches of government will be explained in this chapter.

Chapter 3: The Principles of Constitutional Construction—This chapter will explore those fundamental principles associated with the Hawaiian constitution, the interpretation of its provisions and the scope and limit of its application. In *The King v. Agnee, et al.*, the court stated, "we do not recognize as conclusive the common law nor the authorities of the courts of England or of the United States, any farther than the principles which they support may have become incorporated in our system of laws, and recognized by the adjudication of the [Hawaiian] Supreme Court (1869: 112)." The court continued, "we have great respect for the reasoning of many of these authorities but often they are totally inapplicable to our customs and usages, and in conflict with our mode of procedure." As a monarchy, native usage, customs and official titles predate the constitution, and to a large degree have continued and have been maintained under the constitutional form of governance, e.g. the role of the Konohiki and their landed and piscary rights. Hawaiian constitutionalism was a mixture of ancient traditions and practice together with "the principles of enlightened jurisprudence, without special regard to whether they conform

to English, Massachusetts, or New York authorities (Ibid).” This made the Hawaiian Kingdom *sui generis*, as were all governments of sovereign and independent states, which was an essential character of not just their independence of dominion, but also that of jurisprudence. And as Jennings aptly wrote, “each nation must achieve its destiny by the methods which suit the spirit and the ethos of its history (1959: 46).”

Chapter 4: The Hawaiian Constitution Annotated—This dissertation will conclude with a reprint of the 1864 constitution together with annotations for each of the eighty articles that will utilize recognized authorities of the time and Hawaiian judicial decisions.

VII. CONCLUSION

For the past decade, I have spent a great deal of time doing research in this area, formulating theories and then acting upon them within the political and legal structures of the United States and the international strata. I served as an advocate for the Hawaiian state. This journey has taken me from my naivety in Kuli`ou`ou valley to Washington, D.C., The Hague, Brussels, New York City, Geneva, London, and now the University of Hawai`i at Manoa department of Political Science. The experiences and the education I have gained are monumental and only reinforced my conviction and respect for my kupuna (ancestors) who, against insurmountable odds, managed to firmly secure Hawai`i’s place within the international realm of independent states with a governing body fitting this distinction. But now the time has come for me to temporarily put down the sword of advocacy and seize the mantle of a scholar and a political scientist.

The 1800’s served as an epic century in Hawaiian political and legal history, but present scholarship lacks a comprehensive overview and historical explanation of Hawaiian governance that possessed a constitutional foundation, which provided the framework for its national governance. Presently, though, the scholarship on the political history of 19th century Hawai`i has been mono-focused and entrenched in ethnography that pits the *native* against the *west*. Inaccurate historical interpretations regarding Hawaiian governance have only fueled this centrifuge. By consistently portraying the native Hawaiian as a politically marginalized indigenous group—the victim of the *west*, Craven

argues, from a practical standpoint, "would be to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization…rather than [recognizing] the status accorded under international law to a nation belligerently occupied (2004: 8)." The Hawaiian Kingdom was an internationally recognized political unit and no one could claim to be above Hawaiian law. This is reinforced by §6 of the Hawaiian Kingdom Civil Code, which provides,

> The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom…[and] the property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws (Compiled Laws 1884: 2).

Intellectual diversity, therefore, is needed. This is what is central to my thesis, to directly apply positive theories of sovereignty and governance and, in turn, attributes of such theories to a recognized independent and sovereign State. I will contextualize and explain Hawaiian governance and its relationship with its citizenry, as it existed prior to the 1887 revolution. What I propose to ultimately offer to the discipline of Political Science is an original and important contribution regarding Hawaiian governance deeply rooted in the tenets of classical political science, constitutional theory, and law. In closing, I consider this to be a major contribution to researchers here and abroad, and it is my fervent hope that the information provided in this dissertation outlives me in the quest for developing an intellectual canon for Hawaiian political science and constitutional law.

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