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## LAND TENURE IN THE PACIFIC: THE CONTEXT FOR NATIVE HAWAIIAN LAND RIGHTS

Charles F. Wilkinson\*

The Hawaiian Islands evoke powerful images in the American public conscience. Lying two thousand miles off the shores of San Francisco, in the eastern half of the North Pacific, the islands were forged by volcanic action. Hawai'i is a land of extremes. On the island of Hawai'i, Mounts Mauna Kea and Mauna Loa rise nearly 14,000 feet above sea level. Within a few miles one may travel from snowy peaks to sandy deserts. In comparison, Mount Wai'ale'ale, on the island of Kaua'i, records an average annual rainfall of forty feet—one of the wettest spots on earth. Subtropical in climate, Hawai'i is home to a unique variety of native birds, animals, fish, and plants, and is composed of eight inhabited islands. This "Rainbow Land"<sup>1</sup> is surpassingly beautiful, and in many ways differs dramatically from the mainland. Yet the allure of Hawai'i lies not simply in its physical isolation and warm climate; Hawai'i also enchants because the history of its people is ancient, and, unlike the history of most mainland Americans, is tied as much to Asia and other Pacific Islands as it is to the West.

Anthropologists believe that Polynesians may have lived in Hawai'i some 1500 years or more before they were "discovered" by Captain

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\* Professor of Law, School of Law, University of Colorado. I met Maivân Clech Lâm at a conference on Hawaiian Native Sovereignty in May 1987. At that time we discussed her research on Native Hawaiian land rights and discovered many parallels to the land rights of Native Americans. At the request of the editors of the *Washington Law Review*, I am very pleased to write this introduction to Ms. Lâm's important work, which deals at once with the unique situation in Hawai'i and with the overriding issues relating to aboriginal peoples the world over.

1. See R. KUYKENDALL, *THE HAWAIIAN KINGDOM 1778-1854*, at 2-3 (1938). Professor Kuykendall, the leading Hawaiian historian, explains:

While sunshine is one of the distinctive features of Hawaiian climate, clouds are always to be seen; they drift across the sky and rest like a benediction on the mountain summits; within the space of a few minutes they can appear as if by magic out of the heavens and send down gentle showers or pelting rain—and then vanish with equal speed. 'Liquid sunshine' is an expression frequently heard; and the islands are sometimes spoken of as a 'rainbow land.'

*Id.* On Hawaiian history, see also R. KUYKENDALL & A. DAY, *HAWAII: A HISTORY* (rev. ed. 1961). For technical studies on the climate and geology of Hawai'i, see Blumenstock & Price, *Climates of the States: Hawaii*, in *A NATURAL HISTORY OF THE HAWAIIAN ISLANDS* 155 (E. Kay ed. 1972); G. MACDONALD, A. ABBOTT & F. PETERSON, *VOLCANOES IN THE SEA: THE GEOLOGY OF HAWAII* (2d ed. 1983).

James Cook in 1778.<sup>2</sup> The ancestors of the modern native Hawaiians sailed from Tahiti in successive waves over several hundred years.<sup>3</sup> As Professor Kuykendall, the preeminent scholar on Hawaiian history, concludes: "There is convincing evidence that over a period of about two centuries some six or eight hundred years ago, the route between Tahiti and Hawaii was well known and was used by numerous voyagers."<sup>4</sup> At the end of this period, however, communications between the two societies ceased and the Hawaiians lived in virtual isolation from the rest of the world until the year 1778, when Europeans landed on the scene.<sup>5</sup>

The arrival of the Europeans quickly undermined the traditional culture and society. In 1819 the Hawaiian government officially repudiated the old religion;<sup>6</sup> by 1850 only 80,500 Native Hawaiians remained of the former population of 300,000;<sup>7</sup> and by 1896, Americans and Europeans owned 57% of taxable lands.<sup>8</sup> How these changes occurred is treated with great care in Maivân Clech Lâm's article *The Kuleana Act Revisited*, which follows.<sup>9</sup>

Despite the drastic impact of western society on traditional Hawaiian culture, until 1893 the Kingdom of Hawai'i—the government of the Native Hawaiians—possessed all the attributes of a sovereign nation and was so recognized by the world community.<sup>10</sup> Numerous international agreements and treaties, some of which legally survive today, acknowledged the Kingdom of Hawai'i's right of sovereign independence.<sup>11</sup> The basic constitutional doctrine of the law of

2. See P. KIRCH, *FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHAEOLOGY AND PREHISTORY* 68 (1985).

3. R. KUYKENDALL, *supra* note 1, at 3. This is a remarkable feat in itself because, by European standards, sailing at that time was limited to the shores of the Mediterranean. As Professor Kuykendall remarks, "[t]he Polynesian sailors . . . were making voyages of thousands of miles in the world's mightiest ocean." R. KUYKENDALL & A. DAY, *supra* note 1, at 5.

4. R. KUYKENDALL, *supra* note 1, at 3.

5. *Id.*

6. See *id.* at 65–70.

7. See R. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII: 1778–1965*, at 72 (1968); M. Kelly, *Changes in Land Tenure in Hawaii, 1778–1850*, at 118 (June 1956) (unpublished thesis available at University of Hawai'i Library).

8. A. LIND, *AN ISLAND COMMUNITY* 57 (1938).

9. See also Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975).

10. See Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. 13, 20–21 (1981). The year 1893 is the last date of recognition by the world community of the possession of complete international sovereignty by any native group, within the boundaries of what is now the United States of America. For a discussion of sovereignty of American Indians on the mainland, see generally R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980); C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987).

11. An 1826 agreement between the Kingdom of Hawai'i and the United States declared that "[t]he peace and friendship subsisting between the United States, and their Majesties, the Queen

nations is defined by the “sovereignty and equality of states.”<sup>12</sup> Thus, under international law, the United States and the Kingdom of Hawai‘i were equal sovereigns. Neither nation possessed the right to infringe upon or to terminate the sovereignty of the other.

Yet the course of empire often sweeps aside the law. In 1887, a coup d’état by the Hawaiian League—a band of influential western agriculturalists—instituted the “Bayonet Constitution,” which thrust western landowners into the position of power hitherto occupied by the Hawaiian monarch.<sup>13</sup> In 1893, John L. Stevens, the United States Minister in Hawai‘i, ordered the Marines to land in Honolulu ostensibly to protect American citizens and their property. Stevens recognized a new provisional government even before Queen Lili‘uokalani unwillingly abdicated her authority as reigning Queen of Hawai‘i.<sup>14</sup> An investigation commissioned by newly elected President Cleveland, however, concluded that the overthrow of the Queen had been illegal and recommended that she be restored to power.<sup>15</sup> In his subsequent message to Congress, an angry President Cleveland concluded:

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Regent, and Kauikeaouli, King of the Sandwich Islands, and their subjects and people, are hereby confirmed, and declared to be *perpetual*.” Articles of Arrangement with the King of the Sandwich Islands (Hawaii), Dec. 23, 1826, United States-Hawaii, art. I, 77 Parry’s T.S. 34 (emphasis added). While the United States Senate never ratified the agreement, the State Department found it to be “clearly an international act, signed as such by the authorities of the then independent Hawaiian Government, and by a representative of the United States [who possessed] sufficient authority for his signature.” 3 U.S. DEP’T OF STATE, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1819–1835, at 274 (H. Miller ed. 1933). President John Tyler officially recognized Hawai‘i as a sovereign nation in 1842. R. KUYKENDALL, *supra* note 1, at 195. In 1843, Congress appropriated funds to support a United States Commissioner to reside in Hawai‘i. See Act Making Appropriations for the Civil and Diplomatic Expenses of Government, Sess. III, ch. 100, 5 Stat. 643 (1843).

The two governments formally entered into a treaty of friendship in 1849 which called for “perpetual peace and amity between the United States and the King of the Hawaiian Islands.” Treaty with the Hawaiian Islands, Dec. 20, 1849, United States-Hawaii, 9 Stat. 977, T.S. No. 160. In 1875, they entered into a treaty on commercial reciprocity. Convention on Commercial Reciprocity, Jan. 30, 1875, United States-Hawaii, 19 Stat. 625, T.S. No. 161. The treaties of 1826, 1849, and 1875 were never cancelled. War and hostilities sometimes terminate international treaties, but a general principle of international law is that “a treaty in force is binding upon the parties and must be performed by them in good faith,” and may not be terminated except by the operation of their terms, or by mutual agreement. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 595–96 (2d ed. 1973). In this light, the rights which normally accrue to sovereign nations, and which the treaties of 1826, 1849, and 1875 attributed to the Kingdom of Hawai‘i, may still be in force today with regard to Native Hawaiians.

12. I. BROWNLIE, *supra* note 11, at 280.

13. On the expansion of political control by westerners over the Kingdom of Hawai‘i, see Levy, *supra* note 9, at 861–62. See generally R. KUYKENDALL, *THE HAWAIIAN KINGDOM 1874–1893* (1967).

14. Levy, *supra* note 9, at 862.

15. See R. KUYKENDALL, *supra* note 13, at 622–47.

By an act of war, committed with the participation of the diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.<sup>16</sup>

But Cleveland's sentiments were of no avail. In 1898, after William McKinley became President, the United States annexed the new Republic of Hawai'i into the union.<sup>17</sup> Finally, in 1959, Hawai'i was made a state.<sup>18</sup>

Today almost 20% of the state's population—about 175,000 people—have some Native Hawaiian ancestry.<sup>19</sup> Statistics on health, education, crime, and employment show that Native Hawaiians survive under conditions that are worse than those of nearly any other ethnic group in the state.<sup>20</sup> Furthermore, Native Hawaiians have lost nearly all control of their land. As the Hawaiian Supreme Court recently noted, “[as of 1975], [t]he state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State.”<sup>21</sup>

Maivân Clech Lâm, in her article *The Kuleana Act Revisited*, asserts that, legally, the bulk of the rights of the common Native Hawaiian people in land survived the dislocations caused by European and American intrusion. Lâm analyzes the traditional Native Hawaiian land rights, the language and intent of the specific land acts instituted under King Kamehameha III, and the case law interpreting these acts. She concludes that the system of vested fee simple property rights—

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16. G. Cleveland, PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, Dec. 18, 1893, H.R. EXEC. DOC. NO. 47, 53d Cong., 2d Sess. III, XIV (1893).

17. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898). Interestingly, the proponents of annexation were unable to assemble the two-thirds majority required to ratify a treaty of annexation. Instead, they introduced a joint resolution to accept the treaty, which required only a simple majority of both houses. S. REP. NO. 681, 55th Cong., 2d Sess. 225 (1898); see also H.R. Res. 259, 55th Cong., 2d Sess., 31 CONG. REC. 4600 (1898).

18. Act to Provide for the Admission of the State of Hawaii Into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959) [hereinafter 1959 Admissions Act]. One of the principal reasons Hawai'i was annexed only as a territory in 1898, and did not achieve statehood until 1959, was the racial antagonism that existed between white Americans and Native Hawaiians. For many years, whites popularly agreed that Native Hawaiians were “unfit” either to be self-governing, or to be citizens of the United States. See R. KUYKENDALL, *supra* note 13, at 634–35.

19. Levy, *supra* note 9, at 866. This is the largest proportion of native people in any state in the country; in terms of absolute numbers, only California has a larger native population. D. GETCHES & C. WILKINSON, *FEDERAL INDIAN LAW* 7 (2d ed. 1986).

20. D. GETCHES & C. WILKINSON, *supra* note 19, at 824.

21. *Hawaii Hous. Auth. v. Lyman*, \_\_ Haw. \_\_, 704 P.2d 888, 893 n.4 (1985).

imposed in response to western demands—is parallel to, rather than in derogation of, traditional Hawaiian land rights. Lâm shows that the government of Kamehameha III, which introduced major new land laws, intended not to divest the people of land, but rather to protect commoner interests, and to grant a full one-third of all the kingdom's territory to the commoners in the event of a division of the lands. Finally, Lâm finds that court decisions have left substantial room in which to reconsolidate commoner rights in land. In light of the serious land tenure situation in Hawai'i and the confused state of Native Hawaiian rights, Ms. Lâm's article raises substantial legal and moral issues. The aboriginal rights of 175,000 people and title to one-and-a-half million acres are at stake.

The call for a reconsolidation of Hawaiian land rights is not unprecedented, but rather is akin to the assertion of aboriginal land rights by Indians on the mainland.<sup>22</sup> To be sure, there are differences. The sovereignty of Native Hawaiians continues to exist but, unlike the sovereignty of mainland Indian tribes, is not currently recognized by the United States. Nevertheless, there are direct historical parallels. Indigenous peoples on the mainland and in Hawai'i sustained thriving cultures before contact with Europeans. Both groups had recognized real property rights. Both, upon the conquest of their lands and the annexation of their legal independence, became the beneficiaries of a trust relationship with the United States.<sup>23</sup> Thus, it is appropriate that

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22. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). At issue in *Oneida* was an agreement made in the year 1795 which purportedly transferred 100,000 acres of land from the tribe to the State of New York. The Supreme Court held that the 175-year-old transaction was invalid and that the claim was not time-barred. The tribe had an "unquestioned right" . . . to the exclusive possession of their lands." *Oneida*, 470 U.S. at 235 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). "[T]he Indians' right of occupancy is 'as sacred as the fee simple of the whites.'" *Oneida*, 470 U.S. at 235 (quoting *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)); see C. WILKINSON, *supra* note 10, at 41; see also *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In *Sioux Nation* a special act of Congress in 1978 allowed the tribe to overcome the United States' *res judicata* defenses and to sue on the merits. The Court held that the taking of the Black Hills from the Sioux tribe in 1877 was unconstitutional and that the tribe was entitled to the value of the land and minerals at the time of the taking plus interest for a total of more than \$100 million in damages. *Id.* at 424; see C. WILKINSON, *supra* note 10, at 80.

23. The federal trust responsibility to mainland natives evolved judicially and is based in large part upon *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). In that decision, Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage" and that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

The trust obligation defines the government's standard of conduct toward Indians and, as a result, is a cornerstone of Indian law. See generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 220-28 (2d ed. 1982). The trust relationship with Native Hawaiian people was first enunciated in the Joint Resolution which annexed Hawai'i in 1898. That document states

both peoples receive analogous legal treatment and that Native Hawaiian issues be heard in light of the precedents set by decisions concerning Indians on the mainland.

The question of Native Hawaiian land rights, as so ably presented by Maivân Clech Lâm, raises broad jurisprudential issues. The conflict between security and fairness in property law, the treatment of aboriginal people under the law in general, the importance of keeping treaty promises, the satisfaction of the high duties of a national trust, all signify crucial legal hurdles to the resolution of Native Hawaiian rights. *The Kuleana Act Revisited* measures these issues with sound analysis, and contributes significant new insight to the development of Native land rights in Hawai'i.

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that the public land laws of the United States shall not apply to Hawai'i, but that "Congress . . . shall enact *special* laws for their management and disposition," and all revenues or proceeds from the ceded lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands." Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898) (emphasis added). In 1900 Congress provided that "the laws of Hawaii relating to public lands . . . shall continue in force until Congress shall otherwise provide." Act of Apr. 30, 1900, ch. 339, 31 Stat. 141, 154. Thus Congress established its plenary power to deal with Native Hawaiian land claims. In 1920, Congress passed the Hawaiian Homes Commission Act which placed more than 200,000 acres of land in trust for Native Hawaiians. Hawaiian Homes Commission Act, 48 U.S.C. § 691 (1920) (omitted in view of the admission of Hawai'i into the Union). The trust obligation was again acknowledged in § 5(f) of the 1959 Admissions Act, which specifically names Native Hawaiians as beneficiaries of lands ceded to the U.S. government. 1959 Admissions Act, *supra* note 18, § 5(f), 73 Stat. at 6.