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Hawaiian Nationality: Who Comprises the Hawaiian citizenry?

by David Keanu Sai

The *European Convention on Nationality* defines nationality as the legal bond between a person and a State and does not indicate the person's ethnic origin. It is a person owing loyalty to and entitled by birth or naturalization to the protection of a given State.

The terms nationality and citizenship are synonymous, and affords a person the *political right* to participate in government. Without it, a person is prevented from electing governmental officials or serving as a government official themselves. A *political right* is distinctly different from a *civil right*, which are basic human rights protected by the constitution and laws of the State, irregardless of a person's citizenship. Non-citizens residing in the State are categorized as Aliens or Foreigners.

Internationally there are three ways a person can acquire citizenship within an established State: (1) *jus sanguinis*, where a person acquires the citizenship of his or her parents; (2) *jus soli*, where the nationality is conferred upon a person by birth within the territory of the State; and (3) *naturalization*, where the government grants citizenship upon the application of a foreigner.

On January 21, 1868, the Minister of the Interior for the Hawaiian Kingdom, His Excellency Ferdinand Hutchison, stated the criteria for Hawaiian nationality:

"In the judgment of His Majesty's Government, no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents, (either native or naturalized) during their temporary absence from the kingdom, or unless having been the subject of another power, he becomes a subject of this kingdom by taking the oath of allegiance."

The position of His Majesty's Government was founded upon Hawaiian statute. Section III, Art. I, Chap. V of an Act to Organize the Executive Departments, 1845 and 1846, provided that:

"All persons born within the jurisdiction of this kingdom, whether of alien foreigners, of naturalized or of native parents, and all persons born abroad of a parent native of this kingdom, and afterwards coming to reside in this, shall be deemed to owe native allegiance to His Majesty. All such persons shall be amenable to the laws of this kingdom as native subjects. All persons born abroad of foreign parents, shall unless duly naturalized, as in this article prescribed, be deemed aliens, and treated as such, pursuant to the laws."

There are two exceptions where birth within the territory does not result in citizenship. First, where a child is born within the territory, but the child's parents are foreign ambassadors or diplomats, that child is not a citizen of the territory of birth; and second, where a child is born of alien enemies in an area of the territory under hostile occupation, that child will not be a citizen.

Regarding children of foreign diplomats, Frederick Turrill was an American citizen born in the Hawaiian Islands, but later got naturalized on May 21, 1888; and E.H. Wodehouse was a British subject born in the islands and later naturalized on May 7, 1892.

The second exception was never tested in the Hawaiian Kingdom, because there was obviously no legislature or court in session to pass statutes or render decisions with regard to this question once it happened. But the fact that the Hawaiian Kingdom followed the first exception in practice would indicate strongly that the second exception would apply as well.

There are numerous references to "children born of alien enemies in hostile occupation," and one such reference is a U.S. Supreme Court decision. In the same year the United States began its hostile occupation of Hawaii in 1898 during the Spanish-American War, its Supreme Court rendered a decision concerning the United States citizenship of Wong Kim Ark, a person of Chinese descent. In that decision it also expounded upon the two exceptions to the acquisition of citizenship by birth as determined by the common law of England and made reference to an English case, *Calvin v. Smith*, which was decided by the English Court in the year 1608. Although the Hawaiian Kingdom courts have stated that the common law is not in force in this Kingdom, it did state that

"…in construing our law the Court must be guided by those enactments and the decisions of American and English Courts." *In re Apuna*, 6 Haw. 732 (1869).

In *United States vs. Wong Kim Ark* (1898), the U.S. Supreme Court ruled,

"The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith' or 'power,' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual--as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*--and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. but the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King."

In *Calvin vs. Smith* (1608), the English Court stated:

"…for if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject of the King of England though he be born upon his soil;" and "if any of the King's ambassadors in foreign nations have children…they are natural born subjects [of England], yet they are born out of the King's dominion."

Since the occupation of the Hawaiian Kingdom by the United States is illegal, American citizens born in Hawaiian territory after 1898 cannot be construed to benefit from the nationality laws, and therefore cannot claim to be Hawaiian subjects by birth, *jus soli*.

Similar to the Hawaiian Kingdom, the Baltic States of Estonia, Latvia and Lithuania were occupied by the Russians for over half a century. In 1940, Russian intervention provided for the forced incorporation of these Baltic States into the U.S.S.R. In 1991, with the breakup of the Soviet Union, these Baltic States once again regained their independence and immediately had to deal with the pressing issue of citizenship in the aftermath of prolonged Russian occupation.

Roger Brubaker, author of the article *Citizenship struggles in Soviet Successor States* (1992), stated that Estonia adopted a model for defining the initial body of citizens as the *restored State model*. States who regained their former independence are called restored States, and as these States are not new there would be no need to redefine a new body of citizens, but rather utilize the laws that existed before the occupation to determine the citizenry.

Under this model, persons born in Estonia before the 1940 annexation and their descendants were recognized as having Estonian citizenship. This also included United States citizens who were the offspring of Estonians. Regarding the citizenry of the occupier, the Estonian government also applied the same view the 1898 U.S. Supreme Court had made in *U.S. vs. Wong Kim Ark*. It viewed all Russians who entered the country after the occupation in 1940, and their descendants, as illegal and could not claim Estonian citizenship. But if a Russian was born in Estonia before the occupation that person acquired citizenship. Latvia also adopted the restored State model.

Therefore, it can be stated as a matter of law and based on contemporary examples, that the Hawaiian citizenry of today is comprised of descendants of Hawaiian subjects and those foreigners who were born in the Hawaiian Islands prior to 1898.

This exclusion of the Hawaiian citizenry is based upon precedence and law, but a restored Hawaiian government does have the authority to widen the scope of its citizenry and adopt a more inclusive model in the aftermath of prolonged American occupation. Brubaker stated that Lithuania adopted such a model. Under the *inclusive model*, the original citizenry of Lithuania was confirmed under the *restored State model*, but the foreigners, which included the Russians, were divided into two groups. The first group comprised of permanent residents who would be granted optional inclusion in the Lithuanian citizenry, while the second would be classified as aliens. The optional inclusion of the first group depended upon these residents meeting certain minimum requirements established by the Lithuanian government. (i.e. years of residency and/or language).

David Keanu Sai is presently serving as acting Minister of the Interior and Chairman of the Council of Regency. He served as lead Agent for the acting government of the Hawaiian Kingdom in arbitration proceedings before the Permanent Court of Arbitration at The Hague, Netherlands, from November 1999-February 2001. He is also serving as Agent in a Complaint against the United States of America concerning the prolonged occupation of the Hawaiian Kingdom, which was filed with the United Nations Security Council on July 5, 2001. For more information and updates visit our website at:

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