

Why the Hawaiian Kingdom, as an independent State, Continues to Exist

Keanu Sai, Ph.D.

In 2001, the Permanent Court of Arbitration in the Netherlands verified the existence of the Hawaiian Kingdom as an independent State. The Court stated in arbitration award, “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.” Under international law all States have sovereign equality. States have equal rights and duties and are co-equal members of the international community regardless of their economic, social and political differences. Sovereign equality means:

1. States are judicially equal;
2. Each State enjoys the rights inherent in full sovereignty;
3. Each State has the duty to respect the personality of other States;
4. The territorial integrity and political independence of the State are inviolable;
5. Each State has the right freely to choose and develop its own political, social, economic and cultural systems; and
6. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The claim of State continuity on the part of the Hawaiian Kingdom has to be opposed as against a claim by the United States as to its succession. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one State to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a great deal in terms of their effect.

It is generally held that there are three principles that have some bearing upon the issue of continuity. First, that the continuity of the State is not affected by changes in government even if of a revolutionary nature. Secondly, that continuity is not affected by territorial acquisition or loss, and finally, continuity is not affected by military occupation.

Professor Crawford, *The Creation of States in International Law* (2006), p. 34, points out that, “There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the

continuity of the State, even where there exists no government claiming to represent the occupied State.”

Each of these principles reflects upon one of the key incidents of statehood—territory, government (legal order) and independence—making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of Statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity. According to Hall, *A Treatise of International Law* (1895), p. 22, a State retains its identity “so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.”

If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other States. It is commonly recognized that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entire territory of the State, as they do in case of Hawai’i, and when they are accompanied by effective governance to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is premised upon the “legal” basis of present or past United States claims to sovereignty over the Hawaiian Islands.

To sum it up, any claim to State continuity will be dependent upon the establishment of two legal facts: *first*, that the State in question existed as a recognized entity for purposes of international law at some relevant point in history; and, *secondly*, that intervening events have not been such as to deprive it of that status. It should be made very clear, however, that the issue is not simply one of “observable” or “tangible facts,” but more specifically of “legally relevant facts.” It is not a case, in other words, simply of observing how power or control has been exercised in relation to persons or territory, but of determining the scope of “authority,” which is understood as “a legal entitlement to

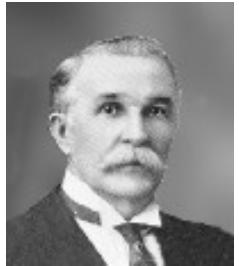
exercise power and control.” Authority differs from mere control by not only being essentially rule governed, but also in virtue of the fact that it is not always entirely dependent upon the exercise of that control.

Under international law, a State who claims to be the successor of another State, when not at war, must take place by cession. Professor Oppenheim, *International Law* (vol. 1, 1948), p. 499, explains that, “cession of State territory is the transfer of sovereignty over State territory by the owner-State to another State.” He further states that the “only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State (p. 500).” The United States only claim to have extinguished the Hawaiian Kingdom is by a joint resolution of annexation passed by its Congress.

A joint resolution, however, is not a treaty or agreement between two States, but rather an agreement between the House of Representatives and the Senate in Washington, D.C. A joint resolution is a municipal law of the United States whose effect is limited to United States territory. The United States Supreme Court, *The Apollon*, 22 U.S. 362, 370 (1824), affirmatively stated, that the “laws of no nation can justly extend beyond its own territory” for it would be “at variance with the independence and sovereignty of foreign nations” In *U.S. v. Belmont*, 301 U.S. 324, 332 (1937), the Court also stated that, “our Constitution, laws and policies have no extraterritorial operation.” And in *United States v. Curtiss-Wright Export Corp.*, (1936), the Court concluded, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.... [T]he court recognized, and in each of the cases cited [involving the exercise of the sovereign power of the United States] found, the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.”

If a joint resolution is limited to United States territory, how can a joint resolution annex a foreign State? Simply answered, it can't and it didn't.

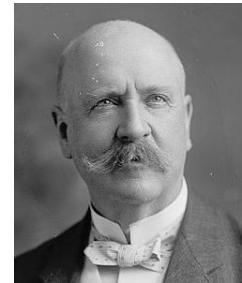
When the House of Representatives and the Senate were debating the joint resolution in 1898, the Congressional record clearly showed that even the Representatives and Senators knew the limitation of congressional laws. On June 15, 1898, Congressman Thomas H. Ball (D-Texas) stated,



“The annexation of Hawai‘i by joint resolution is unconstitutional, unnecessary, and unwise. If the first proposition be true, sworn to support the Constitution, we should inquire no further. I challenge not the advocates of Hawaiian annexation, but those who advocate annexation in the form now presented, to show warrant or authority in our organic law for such acquisition of territory. To do so will be not only to subvert the supreme law of the land but to strike down every precedent in our history. ... Why, sir, the very presence of this measure here is the result of a deliberate attempt to do unlawfully that which can not be done lawfully.”

And on June 20, 1898, Senator Augustus Bacon (D-Georgia) stated,

“That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject matter of a treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution. If Hawaii was to be annexed, it ought certainly to be annexed by a constitutional method; and if by a constitutional method it can not be annexed, no Senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure.” Senator Bacon further explained, “Now, a statute is this: A Statute is a rule of conduct laid down by the legislative department, which has its effect upon all of those within the jurisdiction. In other words, a statute passed by the Congress of the United States is obligatory upon every person who is a citizen of the United States or a resident therein. A statute can not go outside the jurisdiction of the United States and be binding upon the subjects of another power. It takes the consent of the subjects of the other power, speaking or giving their consent through their duly authorized government, to be bound by a certain thing which is enacted in this country; and therein comes the necessity for a treaty.”



Nearly 100 years later, the United States Attorney General’s Office of Legal Counsel was befuddled by Congress’s annexation of the Hawaiian Islands by a joint resolution. In a 1988 memorandum titled “Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea,” the Office of Legal Counsel addressed the annexation of the Hawaiian Islands by joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored the memorandum for Abraham D. Sofaer, legal advisor to the U.S. State Department. After covering the limitation of Congressional authority and the objections made by members of the Congress, Kmiec concluded,



“Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. ... It is therefore 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.”

The United States very own Attorney General’s office in 1988 clearly undermines the claim of sovereignty over the Hawaiian Islands by the United States. If the Attorney General’s Office of Legal Counsel is “unclear” as to the authority of Congress to annex the Hawaiian Islands, it surely cannot be considered as a ”valid demonstration of legal title” by the United States to be the successor of the Hawaiian Kingdom under international law. If the United States is not the successor, then the presumption of the Hawaiian Kingdom’s existence as an independent State is maintained. In other words, the Hawaiian Kingdom’s continued existence is protected by international law even when it has been under an illegal and prolonged occupation by the United States since the Spanish-American War in 1898.

For more information visit: www.hawaiiankingdom.org and
www.hawaiiankingdom.org/blog