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### MEMORANDUM ON THE FORMULA TO DETERMINE PROVISIONAL LAWS

Under customary international law relevant to Queen Lili‘uokalani’s conditional surrender to the United States on 17 January 1893, the United States, as the occupying State, was obligated to administer Hawaiian Kingdom law, which consist of the Civil Code,<sup>1</sup> together with the session laws of 1884<sup>2</sup> and 1886,<sup>3</sup> and the Penal Code.<sup>4</sup> This norm of customary international law was later codified under Article 43 of the 1907 Hague Regulations<sup>5</sup> and Article 64 of the 1949 Fourth Geneva Convention.<sup>6</sup> However, instead of administering the laws of the Hawaiian Kingdom,<sup>7</sup> the United States unlawfully annexed the Hawaiian Islands in 1898 during the Spanish-American War and began to impose its municipal laws over Hawaiian territory since then to the present.

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<sup>1</sup> Civil Code of the Hawaiian Kingdom (1884) (online at <https://hawaiiankingdom.org/civilcode/index.shtml>).

<sup>2</sup> Session Laws of the Hawaiian Kingdom (1884) (online at [https://hawaiiankingdom.org/pdf/1884\\_Laws.pdf](https://hawaiiankingdom.org/pdf/1884_Laws.pdf)).

<sup>3</sup> Session Laws of the Hawaiian Kingdom (1886) (online at [https://hawaiiankingdom.org/pdf/1884\\_Laws.pdf](https://hawaiiankingdom.org/pdf/1884_Laws.pdf)).

<sup>4</sup> Penal Code of the Hawaiian Kingdom (1869) (online at [https://hawaiiankingdom.org/pdf/Penal\\_Code.pdf](https://hawaiiankingdom.org/pdf/Penal_Code.pdf)).

<sup>5</sup> Article 43 of the 1907 Hague Regulations states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

<sup>6</sup> Article 64 of the 1949 Fourth Geneva Convention states, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”

<sup>7</sup> See David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 57-94 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian\\_Royal\\_Commission\\_of\\_Inquiry\\_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

To administer Hawaiian Kingdom law as it existed in 1893 would not be prudent given the longevity of the military occupation that is now at 130 years. Therefore, to bring the laws of the Hawaiian Kingdom up to date, the Council of Regency proclaimed provisional laws for the Realm because of the prolonged military occupation. The proclamation of provisional laws of 10 October 2014 states:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

And, We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void;

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).<sup>8</sup>

Before determining what United States statutes, State of Hawai‘i statutes, and County ordinances (collectively referred to herein as “American municipal laws”) are not “contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law,” there must be a type of interpretive methodology for extracting a conclusion based on the doctrine of necessity and the principle of constitutional necessity allowable under Hawaiian law.

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<sup>8</sup> Council of Regency, *Proclamation of Provisional Law* (10 Oct. 2014), (online [https://hawaiiankingdom.org/pdf/Proc\\_Provisional\\_Laws.pdf](https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf)).

This memorandum provides a formula to be used for determining what American municipal laws may be considered the provisional laws of the Hawaiian Kingdom during the American military occupation that augments and not replaces the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code. American municipal laws to be considered as provisional laws exclude the provisions of the constitutions of the United States and the State of Hawai‘i. The Hawaiian Constitution of 1864, as amended,<sup>9</sup> remains the constitutional order and organic law of the country. This memorandum is intended for the use of American authorities operating within the territorial jurisdiction of the Hawaiian Kingdom to determine which American municipal laws may be considered provisional laws during its effective control of Hawaiian territory.

With a view to bringing compliance with international humanitarian law by the State of Hawai‘i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations,<sup>10</sup> the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The proclamation read:

Whereas in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai‘i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Powers of the Kingdom, do hereby recognize the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;

And, We do hereby further proclaim that the State of Hawai‘i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law.<sup>11</sup>

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<sup>9</sup> 1864 Constitution, as amended (online at [https://hawaiiankingdom.org/pdf/1864\\_Constitution.pdf](https://hawaiiankingdom.org/pdf/1864_Constitution.pdf)).

<sup>10</sup> Article 42 of the 1907 Hague Regulations states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

<sup>11</sup> Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (3 June 2019) (online [https://www.hawaiiankingdom.org/pdf/Proc\\_Recognizing\\_State\\_of\\_HI.pdf](https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf)).

The State of Hawai‘i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the “laws in force in the country.”<sup>12</sup> Prior to the proclamation, the State of Hawai‘i and its Counties were established by virtue of U.S. Congressional legislation unlawfully imposed within Hawaiian territory, being the war crime of *usurpation of sovereignty during military occupation*. According to Professor Schabas, “the actus reus of the offense of ‘usurpation of sovereignty’ would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation.”<sup>13</sup>

The establishment and maintenance of the civilian governments of the United States and the State of Hawai‘i and its Counties within the territory of the Hawaiian Kingdom are not “necessary for military purposes of the occupation,” but rather have been established to benefit the United States and its citizenry. The existence of these civilian governments also constitutes a violation of the Hawaiian citizenry’s right to self-determination under international law. Professor Saul explains that the principle of self-determination is where “the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure.”<sup>14</sup>

Moreover, according to Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States, “each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects [...] but subject always to the laws and statutes of the two countries respectively.”<sup>15</sup> The imposition of American municipal laws is not only a violation of international humanitarian law and international criminal law, but also a violation of the 1849 treaty.

Professor Benvenisti explains that “[d]uring the occupation, the ousted government would often attempt to influence life in the occupied area out of concern for its nationals [...]. One way to accomplish such goals is to legislate for the occupied population.”<sup>16</sup> While

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<sup>12</sup> Article 43 of the 1907 Hague Regulations.

<sup>13</sup> William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 157 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian\\_Royal\\_Commission\\_of\\_Inquiry\\_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

<sup>14</sup> Matthew Saul, “The Right to Self-Determination and the Prolonged Occupation of Palestinian Territory,” in Gentian Zyberi (ed.), *Protecting Community Interests through International Law* 3 (2021).

<sup>15</sup> Treaty with the United States of America, in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 305, 307 (2020).

<sup>16</sup> Eyal Benvenisti, *The International Law of Occupation* 104 (2nd ed., 2012).

some “national courts, and a number of scholars have rejected any duty to respect legislation made by the ousted government while it is outside the occupied area [,] the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign’s new legislation as long as it addresses those issues in which the occupant has no power to amend the local laws.”<sup>17</sup> The difference here, however, is that the Council of Regency is not operating in exile or “outside the occupied area,” but rather was established and is operating *in situ*—within the territorial jurisdiction of the Hawaiian Kingdom. Furthermore, “even if the occupant does not have to respect such new legislation, the legislation would be regarded as valid nevertheless by the returning sovereigns or by its courts which would apply them retroactively at the end of the occupation.”<sup>18</sup>

To legislate is also an exercise of the police power of the Occupied State. While police power escapes an exact definition, it is understood to be the ability of the government of a State to enact legislation to safeguard its citizenry. During times of military occupation, international humanitarian law would allow this. In *Berman v. Parker*, the United States Supreme Court stated that “[p]ublic safety, public health, morality, peace and quiet, law and order [...] are some of the more conspicuous examples of the traditional application of the police power.”<sup>19</sup>

Based on the *doctrine of necessity*, Professor Lenzerini states that “the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom.”<sup>20</sup> He also holds that the Regency “has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.”<sup>21</sup>

### *Doctrine of Necessity*

Under English common law, Professor de Smith states that deviations from a State’s constitutional order “can be justified on grounds of necessity.”<sup>22</sup> He also asserts that “State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution.”<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, 105.

<sup>19</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>20</sup> Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317-333, 324 (2020).

<sup>21</sup> *Id.*, 325.

<sup>22</sup> Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).

<sup>23</sup> *Id.*

Certain principles of English common law have been recognized in the Hawaiian Kingdom. In *The King v. Agnee et al.*, the Hawaiian Supreme Court stated that “[w]e 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 Supreme Court.”<sup>24</sup> In *Agnee*, the Court cited English common law commentators on criminal law such as Chitty and Bishop as well as English criminal cases.

Professor Oppenheimer explains that “a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country.”<sup>25</sup> In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated that there are certain limitations to the principle of necessity, “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 run contrary to the policy of the lawful sovereign.”<sup>26</sup>

Other national courts, to include the U.S. Supreme Court,<sup>27</sup> have consistently held that emergency action cannot justify a subversion of a State’s constitutional order. The doctrine of necessity provides the necessary parameters and limits of emergency action so as not to subvert. Of the five governing principles of necessity which apply to the assumption of vacant government office(s), four of these principles apply to the current situation of interpreting what laws are to be considered the provisional laws of the Hawaiian Kingdom. These include:

1. an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
2. there must be no other course of action reasonably available;
3. any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
4. it must not impair the just rights of citizens under the Constitution[.]<sup>28</sup>

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<sup>24</sup> *The King v. Agnee et al.*, 3 Haw. 106, 112 (1869).

<sup>25</sup> F.W. Oppenheimer, “Governments and Authorities in Exile,” 36 *Am. J. Int’l. L.* 568, 581 (1942).

<sup>26</sup> See *Madzimbamuto v. Lardner-Burke*, 1. A.C. 645, 732 (1969). See also *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokosto v. HM King Moshoeshoe II*, LRC (Const) 24, 132 (1989).

<sup>27</sup> *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

<sup>28</sup> *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88-89 (1986).

## *Constitutional Necessity*

According to Professor Paulsen, the constitution of necessity “properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results.”<sup>29</sup> U.S. President Abraham Lincoln was the first to invoke the principle of constitutional necessity, or in his words “indispensable necessity.” President Lincoln determined his duty to preserve, “by every indispensable means, that government—that nation—of which the constitution was the organic law.”<sup>30</sup> In his letter to U.S. Senator Hodges, President Lincoln explained the theory of constitutional necessity.

By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.<sup>31</sup>

Like the United States, the Hawaiian Kingdom is a constitutional form of governance whereby the 1864 Constitution, as amended, limits governmental powers. The American republic’s constitution is similar yet incompatible to the Hawaiian monarchical constitution. The primary distinction is that the former establishes the functions of a republican form of government, while the latter establishes the function of a constitutional monarchy. Both adhere to the separation of powers doctrine of the executive, legislative and judicial branches. Where they differ as regards this doctrine, however, is in the aspect that the American constitution provides separate but equal branches of government, while the Hawaiian constitution provides for separate but coordinate branches of government, whereby the Executive Monarch retains a constitutional prerogative to be exercised in extraordinary situations within the confines of the constitution.

Under the American construction of separate but equal, the Congress, as the legislative branch, can paralyze government if it does not pass a budget for government operations, and the President, as head of the executive branch, can do nothing to prevent the shutdown.

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<sup>29</sup> Michael Stokes Paulsen, “The Constitution of Necessity,” 79(4) *Notre Dame L. Rev.* 1268 (2004).

<sup>30</sup> Letter from Abraham Lincoln, U.S. President, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *Abraham Lincoln: Speeches and Writings 1859-65*, Don E. Fehrenbacher (ed.), 585-86 (1989).

<sup>31</sup> *Id.*

On the contrary, the Hawaiian Kingdom’s executive is capable of intervention by constitutional prerogative should the occasion arise, as occurred in 1855.

In that year’s legislative session, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget. King Kamehameha IV explained that “the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about \$200,000, which Bill we could not sanction.”<sup>32</sup> After the House of Nobles “repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed it Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people in the Kingdom.”<sup>33</sup> A new election for Representatives occurred and the Legislative Assembly was reconvened in special session and a budget passed.

Under Article 24 of the 1864 Constitution, the Executive Monarch took the following oath: “I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.” The Ministers, however, took another form of oath: “I solemnly swear in the presence of Almighty God, that I will faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties of [Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General].”

Lincoln viewed the source of constitutional necessity as arising from the oath taken by the executive chief, whereby the duty for making “constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—[is] in the President of the United States, whose special sworn duty the Constitution makes it to ‘preserve, protect and defend the Constitution of the United States.’”<sup>34</sup> The operative word for the Executive Monarch’s oath of office is “to maintain the Constitution of the Kingdom whole and inviolate.” Inviolable meaning free or safe from injury or violation. The Hawaiian constitution is the organic law for the country.

### *Exercising the Constitutional Prerogative without a Monarch*

In 1855, the Monarch exercised his constitutional prerogative to keep the government operating under a workable budget, but the king also kept the country safe from injury by

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<sup>32</sup> Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* 62 (1918).

<sup>33</sup> *Id.*

<sup>34</sup> Paulsen, 1258.



an unwarranted increase in taxes. The duty for making constitutional decisions in extraordinary situations, in this case as to what constitutes the provisional laws of the country during a prolonged and illegal belligerent occupation, stems from the oath of the Executive Monarch. The Council of Regency serves in the absence of the Monarch; it is not the Monarch and, therefore, cannot take the oath.

The Cabinet Ministers that comprise the Council of Regency have taken their individual oaths to “faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties” of their offices, but there is no prerogative in their oaths to “maintain the Constitution of the Kingdom whole and inviolate.” Therefore, this prerogative must be construed to be inherent in Article 33 when the Cabinet Council serves as the Council of Regency, “who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.” The Monarch’s constitutional prerogative is in its “Powers” that the Council of Regency temporarily exercises in the absence of the Monarch. Therefore, the Council of Regency has the power “to maintain the Constitution of the Kingdom whole and inviolate,” and, therefore, provisionally legislate, through proclamations, for the protection of Hawaiian subjects during the American military occupation.

#### *Legal Status of American Municipal Laws in the Hawaiian Kingdom*

Under public international law, the laws and administrative measures of the United States that have been imposed throughout the territory of the Hawaiian Kingdom have no extra-territorial effect. In *The Lotus* case, the Permanent Court of International Justice explained, “[n]ow the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”<sup>35</sup> According to Judge Crawford, derogation of this principle will not be presumed.<sup>36</sup> Therefore, under public international law, American municipal laws being imposed in the Hawaiian Kingdom are not laws but rather situations of facts. Within the Hawaiian constitutional order, this distinction between situations of facts and Hawaiian law is fundamental so as not to rupture the Hawaiian legal system in this extraordinary and extralegal situation of a prolonged military occupation.

As Professor Dicey once stated, “English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they

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<sup>35</sup> *The Lotus*, PCIJ Series A, No. 10, 18 (1927).

<sup>36</sup> James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).

enforce is not a foreign law, but a right acquired under the law of a foreign country.”<sup>37</sup> Any right acquired under American municipal laws that have been unlawfully imposed within the territory of the Hawaiian Kingdom, being a situation of fact and not law, must be recognized by Hawaiian law. Without it being acquired under Hawaiian law, there is no right to be recognized. Before any right can be claimed, American municipal laws must first be transformed from situations of facts into provisional laws of the Hawaiian Kingdom.

In determining which American municipal laws, being situation of facts, shall constitute a provisional law of the kingdom, the following questions need to be answered. If any question is answered with “yes,” with the exception of question 5, then it is not to be considered a provisional law.

1. The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?
2. Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.
3. If the American municipal law has no comparison to Hawaiian Kingdom law, would it be authorized under the Hawaiian Kingdom’s police power?
4. If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?
5. Does the American municipal law infringe vested rights secured under Hawaiian law?
6. And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

*Application to State of Hawai‘i statutes on  
Murder, Manslaughter, and Negligent Homicide*

**§707-701 Murder in the first degree.** (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

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<sup>37</sup> A.V. Dicey, *The Conflict of Laws* 12 (6th ed., 1949).

- (a) More than one person in the same or separate incident;
  - (b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;
  - (c) A person known by the defendant to be a witness in a criminal prosecution and the killing is related to the person's status as a witness;
  - (d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section;
  - (e) A person while the defendant was imprisoned;
  - (f) A person from whom the defendant has been restrained, by order of any court, including an ex parte order, from contacting, threatening, or physically abusing pursuant to chapter 586;
  - (g) A person who is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order;
  - (h) A person known by the defendant to be a witness in a family court proceeding and the killing is related to the person's status as a witness; or
  - (i) A person whom the defendant restrained with intent to:
    - (i) Hold the person for ransom or reward; or
    - (ii) Use the person as a shield or hostage.
- (2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1972, c 9, pt of §1; am L 1986, c 314, §49; am L 2001, c 91, §4; am L 2006, c 230, §27; am L 2011, c 63, §2; am L 2016, c 214, §1]

**§707-701.5 Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person; provided that this section shall not apply to actions taken under chapter 327L.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1986, c 314, §50; am L 2018, c 2, §6]

**§707-702 Manslaughter.** (1) A person commits the offense of manslaughter if:

- (a) The person recklessly causes the death of another person; or
  - (b) The person intentionally causes another person to commit suicide;
- provided that this section shall not apply to actions taken under chapter 327L.

(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be

determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be; provided that an explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant's discovery, defendant's knowledge, or the disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant's explanation includes the discovery, knowledge, or disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict.

(3) Manslaughter is a class A felony. [L 1972, c 9, pt of §1; am L 1987, c 181, §8; am L 1996, c 197, §2; am L 2003, c 64, §1; am L 2006, c 230, §28; am L 2018, c 2, §7; am L 2019, c 149, §1]

**§707-702.5** Negligent homicide in the first degree. (1) A person commits the offense of negligent homicide in the first degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol; or

(b) A vulnerable user by the operation of a vehicle in a negligent manner.

(2) A person who violates subsection (1)(a) shall be guilty of a class B felony; provided that the person shall be guilty of a class A felony when the person:

(a) Has been convicted one or more times for the offense of operating a vehicle under the influence within fifteen years of the instant offense;

(b) Is, at the time of the instant offense, engaging in conduct that would constitute a violation of section 291E-62; or

(c) Is a highly intoxicated driver as defined by section 291E-1.

(3) A person who violates subsection (1)(b) shall be guilty of a class B felony.

(4) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, and any other law to the contrary, the sentencing court may impose a lesser sentence for a person convicted of a class A felony under this section if the court finds that strong mitigating circumstances warrant the action. Strong mitigating circumstances shall include but not be limited to the provisions of section 706-621. The court shall provide a written opinion stating its reasons for imposing the lesser sentence.

(5) For the purposes of this section, a person "has been convicted one or more times for the offense of operating a vehicle under the influence" if the person has one or more:

(a) Convictions under section 291E-4(a), 291E-61, 291E-61.5, or 291E-64;

(b) Convictions in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an

unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or

(c) Adjudications of a minor for a law violation that, if committed by an adult, would constitute a violation of section 291E-4(a), 291E-61, or 291E-61.5, that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside before the instant offense shall not be deemed prior convictions for the purposes of this section. [L 1988, c 292, pt of §1; am L 2012, c 316, §2; am L 2022, c 48, §2]

**§707-703 Negligent homicide in the second degree.** (1) A person commits the offense of negligent homicide in the second degree if that person causes the death of:

- (a) Another person by the operation of a vehicle in a negligent manner; or
- (b) A vulnerable user by the operation of a vehicle in a manner that constitutes simple negligence as defined in section 707-704(2).

(2) Negligent homicide in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1988, c 292, §2; am L 2012, c 316, §3]

**§707-704 Negligent homicide in the third degree.** (1) A person is guilty of the offense of negligent homicide in the third degree if that person causes the death of another person by the operation of a vehicle in a manner which is simple negligence.

(2) “Simple negligence” as used in this section:

(a) A person acts with simple negligence with respect to the person’s conduct when the person should be aware of a risk that the person engages in that conduct.

(b) A person acts with simple negligence with respect to attendant circumstances when the person should be aware of a risk that those circumstances exist.

(c) A person acts with simple negligence with respect to a result of the person’s conduct when the person should be aware of a risk that the person’s conduct will cause that result.

(d) A risk is within the meaning of this subsection if the person’s failure to perceive it, considering the nature and purpose of the person’s conduct and the circumstances known to the person, involves a deviation from the standard of care that a law-abiding person would observe in the same situation.

(3) Negligent homicide in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1988, c 292, §3]

*Hawaiian Kingdom law on Murder and Manslaughter*

**Penal Code, Chapter VII (As amended by the Act of June 30, 1860)**

1. Murder is the killing of any human being with malice aforethought, without authority, justification or extenuation by law.
2. When the act of killing another is proved, malice aforethought shall be presumed, and the burthen shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor.
3. Whoever is guilty of murder shall be punished by death.
4. In every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection.
5. Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter.
6. Manslaughter is of three degrees, and the jury under an indictment for murder or manslaughter may return a verdict of manslaughter in either degree, or of assault and battery, as the facts proved will warrant.
7. Whoever is guilty of manslaughter in the first degree shall be punished by imprisonment at hard labor, for a term of years not less than ten, nor more than twenty, in the discretion of the court.
8. Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor, not more than ten years or less than five years.
9. Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor not more than five years, or by a fine not more than one thousand dollars, in the discretion of the court.
10. Whoever, under an indictment for murder, or manslaughter, shall be found guilty of assault and battery, as provided in section 6 of this chapter, shall be punished by imprisonment at hard labor not more than two years, or by a fine not exceeding five hundred dollars, in the discretion of the court.
11. No person shall be adjudged to have killed another unless death ensues within a year and a day from the injury inflicted.

12. Chapter VII of the Penal Code is hereby repealed from and after the passage of this chapter: Provided, however, that such repeal shall not take affect any offense committed or penalty or forfeiture incurred under said chapter, but that the same shall remain in full force in respect to the liability of any person to be proceeded against, or against whom proceedings are pending, for any offense committed under said chapter.

#### COMMENTARY

**General analysis.** The Hawaiian Kingdom law on murder draws from the English law—the 1752 *Murder Act*.<sup>38</sup> Like the *Murder Act*, the Hawaiian statute provides that “[w]hoever is guilty of murder shall be punished by death,” and “[i]n every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection.” Section 2 of the *Murder Act* provides that after the execution, the body of the murderer be delivered “to the hall of the Surgeons Company...to be dissected and anatomized by the said Surgeons.”

Teaching human anatomy “became essential for a European medical education, with Paris, Edinburgh and London (in that order of priority) attracting fee-paying students anxious to obtain extra qualifications as physicians and surgeons from dissecting criminal corpses.”<sup>39</sup> Under the *Murder Act*, post-mortem dissection was also viewed as post-mortem punishment to serve as a deterrent for the crime. In the Hawaiian Kingdom, there was no Surgeons Company but only surgeons in private practice or employed by Queen’s Hospital being a quasi-public medical institution. Unlike the *Murder Act*, the sentence to post-mortem dissection was discretionary by the court and only considered if the body was requested by a surgeon, which would appear for the purpose of medical education and not post-mortem punishment.

Under the 1850 Penal Code, the murder statute had two degrees, but this was repealed by the Legislature in 1860 to have none.<sup>40</sup> Manslaughter, however, had three degrees to be considered by the jury.

**Do the State of Hawai‘i statutes on murder, manslaughter and negligent homicide violate any provisions of the 1864 Constitution, as amended? No.**

**Do they run contrary to a monarchical form of government? No.**

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<sup>38</sup> 25 George II, c. 37.

<sup>39</sup> Elizabeth T. Hurren, *Dissecting the Criminal Corpse: Staging Post-Execution Punishment in Early Modern England* 5 (2016).

<sup>40</sup> An Act to Amend the Law Relating to Murder and Manslaughter (1860).

**If the State of Hawai‘i statutes on murder, manslaughter and negligent homicide have no comparison to Hawaiian Kingdom law, would it be authorized under the Hawaiian Kingdom’s police power?** Not applicable because the Hawaiian Kingdom has a law on murder and manslaughter.

**If the State of Hawai‘i statutes on murder, manslaughter and negligent homicide are comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute on murder and manslaughter?** Under the 1850 Penal Code, the Hawaiian statute on murder provided first and second degrees. First-degree murder carried the death penalty and second-degree murder carried “imprisonment at hard labor for a term of years not less than five nor more than twenty, in the discretion of the court.” The 1850 statute on manslaughter, however, did not have degrees, which stated:

The laws should make some allowance for human infirmity; therefore whoever kills another without malice aforethought, under the sudden impulse of passion, excited by provocation or other adequate cause, whether insult, threats, violence or otherwise, by the party killed, of a nature tending to disturb the judgment and faculties, and weaken the possession of a self-control of the killing party, is not guilty of murder but manslaughter; and shall be punished by imprisonment at hard labor not more than ten years, or by fine not less than one thousand dollars, nor more than ten thousand dollars.

The 1860 Legislature amended that statute to remove the degrees of murder and provide three degrees of manslaughter. The punishment for murder was death and the punishment for the degrees of manslaughter varied by years of imprisonment. The State of Hawai‘i statute has two degrees of murder, no degrees for manslaughter, and three degrees of negligent homicide.

While the punishment under Hawaiian statute is death for murder and imprisonment at hard labor, it does reflect criminal laws of other foreign States in the nineteenth century to include the United States. Hard labor is a “punishment, additional to mere imprisonment, sometimes imposed upon convicts sentenced to a penitentiary for serious crimes, or for misconduct while in prison.”<sup>41</sup> However under Hawaiian Kingdom criminal statutes, all sentencing to imprisonment is at hard labor. It was not an addition to imprisonment.

With the progressive affirmation of human rights in international law, the death penalty has started to be seen as inconsistent with the very idea of human dignity. Since then, the

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<sup>41</sup> *Black’s Law* 717 (6th ed., 1990).



international community of States adopted several instruments that ban the use of the death penalty. These instruments include:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;<sup>42</sup>
- Protocol No. 6 to the European Convention on Human Rights, concerning the abolition of the death penalty, and Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances;<sup>43</sup> and
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.<sup>44</sup>

As a member of the community of States, the Hawaiian Kingdom's statute on the death penalty and imprisonment at hard labor is inconsistent with the most recent developments of international law and should no longer be enforced.

Nearly every state in the American Union and the federal government has a felony murder rule. The "rule allows a defendant to be charged with first-degree murder for a killing that occurs during a dangerous felony, even if the defendant is not the killer."<sup>45</sup> The felony-murder rule has been used to support murder convictions of defendants where one victim of a robbery accidentally shoots another victim,<sup>46</sup> where one of the defendant's co-robbers kills another co-robber during a robbery for the latter's refusal to obey orders and not as part of the robbery transaction,<sup>47</sup> and where the defendant (a dope addict) commits robbery of the defendant's homicide victim as an afterthought following the killing.<sup>48</sup> The application of the felony-murder rule dispenses with the need to prove that culpability with respect to the homicidal result that is otherwise required to support a conviction for murder and therefore leads to anomalous results. Therefore, the felony murder rule is inconsistent the Hawaiian statute on murder.

**Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on vested rights secured under Hawaiian law? No.**

**Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on the obligations of the Hawaiian Kingdom under customary international law or being a Contracting State to its treaties? Yes.** Although not a party to any treaty

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<sup>42</sup> General Assembly resolution 44/128.

<sup>43</sup> Council of Europe, European Treaty Series – No. 114.

<sup>44</sup> Organization of American States, Treaty Series – No. 73.

<sup>45</sup> Justia, *Felony Murder* (online at: <https://www.justia.com/criminal/offenses/homicide/felony-murder/>).

<sup>46</sup> *People v. Harrison*, 203 Cal. 587, 265 P. 230 (1928).

<sup>47</sup> *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

<sup>48</sup> *People v. Arnold*, 108 Cal. App. 2d 719, 239 P.2d 449 (1952).

banning the use of the death penalty and cruel punishment, the Hawaiian Kingdom recognizes that banning the death penalty and cruel punishment is a duty of States, in line with the recent developments in the field of international human rights law. Therefore, the Hawaiian Kingdom statute on the death penalty and imprisonment at hard labor should be considered as no longer consistent with international law.

**Conclusion.** Considering this analysis, the State of Hawai‘i laws on murder, manslaughter and negligent homicide are not “contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law.” To the extent that the felony murder rule is omitted, the State of Hawai‘i law on murder would be consistent with the Hawaiian Kingdom law on murder.



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Minister of the Interior

Minister of Foreign Affairs *ad interim*