

HAWAIIAN CONSTITUTIONAL GOVERNANCE

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Hawaiian constitutionalism was an eclectic process drawing on political ideas and experiments of other countries as well as from the trials and tribulations of Hawaiian rulers. Hopkins observed that the first Hawaiian constitution in 1840 appeared to be a combination of “the Pentateuch, the British government, and the American Declaration of Independence.”¹ While it is true that Hawaiian constitutionalism may have drawn from British and American political experience, its history and circumstances were unique. Hawai‘i did not undergo the firebrand of revolution that escalated to regicide in Great Britain and France, and Hawaiian history finds no comparison to Locke and Rousseau’s social contract theory recognizing popular sovereignty resident in the people. What is apparent, though, was that the political leadership borrowed and/or was influenced by legal cultures throughout Europe and the United States, especially in the formative years of its transformation from autocratic rule to constitutional governance.

Cooley’s 1868 treatise on *Constitutional Limitations*, often cited in Hawaiian Kingdom court decisions,² distinguishes between a *constitution* and a *constitutional government*. According to Cooley, a *constitution* is “that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.”³ But a *constitutional government* applies “only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights and shield them against the exercise of arbitrary power.”⁴ Therefore, all nations have constitutions, in which some leading principles have “prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded.”⁵ But not all nations have constitutional governments.

The history from absolute *constitution* to a *constitutional government* is a narrative of the interplay of internal and external forces that shaped the government of the Hawaiian Kingdom. Throughout nineteenth century Europe, there were two main strands of constitutional development—liberalizing a monarchy as advocated in Great Britain, and enlightening despotism that took place on the European continent.⁶ Both strands sought to limit the monarch’s authority, and monarchs rarely were willing participants. And to this Hawai‘i can add a third strand of constitutional development—paragon of virtue. Neither the threat of internal revolt nor the curtailing of powers

¹ Manley Hopkins, *Hawaii: The Past, Present and Future of its Island Kingdom* (1869), 478.

² *Hyman Brothers v. John M. Kapena, Collector-General of Customs*, 7 Haw. 76 (1887); *The King v. Young Tang*, 7 Haw. 49 (1887); *Harriet A. Coleman v. Charles C. Coleman*, 5 Haw. 300 (1885); *Aliens and Denizens*, 5 Haw. 167 (1884); *C.T. Gulick, Minister of the Interior, v. William Flowerdew*, 6 Haw. 414 (1883); *In Re Petition of Clarence W. Ashford, for admission to the Bar*, 4 Haw. 614 (1883); *The King v. Tong Lee*, 4 Haw. 335 (1880); *A.S. Cleghorn v. Bishop and Al., Administrators of the Estate of His Late Majesty Kamehameha V*, 3 Haw. 483 (1873); *In Re Wong Sow on Habeas Corpus-Appeal from Decree of Hartwell, J.*, 3 Haw. 503 (1873); *James A. Burdick v. Godfrey Rhodes and James S. Lemon, Executors, &c.*, 3 Haw. 250 (1871); *In Re Gip Ah Chan*, 6 Haw. 25 (1870).

³ Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (1868), 2.

⁴ *Id.*, 3.

⁵ *Id.*, 2.

⁶ John A. Hagwood, *Modern Constitutions Since 1787* (1939), 2.

was the driving force of Hawaiian constitutionalism. Rather, it was the collective endeavor of the Chiefs, under the sanction of Kamehameha III and the tutelage of their instructor of political science, William Richards, to establish a constitutional government whereby all people, whether Chiefs or commoners, were equal before the law. Both foreign intervention and the threat of more served as a driving force for government reform, but reform itself was a national matter and ultimately left to the deliberations and work of the King and Chiefs.

With the implied recognition of the autonomy of the Hawaiian Kingdom by the United States in 1826 and the French in 1839, Great Britain could no longer assert its claim of “sovereignty not only by discovery, but by a direct and formal Cession by the Natives,”⁷ without attracting trouble for itself from the United States and France. It was during this time that the Hawaiian Kingdom began to evolve from absolute rule under a multi-tiered feudal system of governance to a unitary State under a constitutional monarchy. 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 it were entirely separate and distinct from the others. This would infer a severance in the chain of *de jure* governance and complicate matters. 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.

Kamehameha III’s government stood upon the crumbling foundations of a feudal autocracy that could no longer handle the weight of geo-political and economic forces sweeping across the islands. Uniformity of law across the realm and the centralization of authority had become a necessity. Foreigners were the source of many of these difficulties that centered on questions relating to their entry into “the country, to reside there, to engage in business (trade, agriculture, missionary work, etc.), to acquire house lots and land by lease or otherwise, to build houses on the land so acquired, and to transfer their property either by sale, lease, will, or inheritance.”⁸ Just as Great Britain was forced to adjust its old governing order to the new social system brought about by the industrial revolution in the First Reform Act of 1832, for example, the governing order of the Hawaiian Kingdom would also have to adjust to the change in its social system as a result of increased commercial trade and resident foreigners. In 1831, General William Miller, an Englishman, made the following observation about the Hawaiian governing order.

If then the natives wish to retain the government of the islands in their own hands and become a nation, if they are anxious to avoid being dictated to by any foreign commanding officer that may be sent to this station, it seems to be absolutely necessary that they should establish some defined form of government, and a few fundamental laws that will afford security for property; and such commercial regulations as will serve for their own guidance as well as for that of foreigners; if these regulations be liberal, as they ought to be, commerce will flourish, and all classes of people will be gainers.⁹

In order to address such vexing problems, Kamehameha III turned to his religious advisors—the missionaries—for advice on the matter. William Richards, one of the missionaries own, volunteered to travel to the United States in search of someone who would instruct the chiefs on

⁷ "Secret Instructions to Lord Byron," *Report of the Historical Commission of the Territory of Hawaii for the two years ending December 31, 1826* (September 14, 1824), 19.

⁸ Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, Vol. I (1938), 137.

⁹ *Id.*, 122.

government reform. Unable to secure an instructor in this way, Richards committed himself at the urging of Kamehameha III to instruct the Chiefs on political economy and governance. Commenting on the change in Great Britain brought about by the Industrial Revolution, Smellie states, that when “population was so rapidly increasing and when trade and industry were expanding faster than they had ever done before, two problems were always to the fore: to understand the scope and nature of the changes which were taking place, and to adjust the machinery of government to a new social order.”¹⁰ Richards, who had no formal education in political science, relied on the work of Wayland, President of Brown University. Wayland was interested in “defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members.”¹¹

Richards developed a curriculum based upon Hawaiian translations of Wayland’s two books, “Elements of Moral Science (1835)” and “Elements of Political Economy (1837).” According to Richards, the “lectures themselves were mere outlines of general principles of political economy, which of course could not have been understood except by full illustration drawn from Hawaiian custom and Hawaiian circumstances.”¹² Through his instruction, Richards sought to theorize governance from a foundation of Natural Rights within an agrarian society based upon capitalism that was not only cooperative in nature, but also morally grounded in Christian values. In Richards translation of Wayland’s *Elements of Political Economy*, he stated, “Peace and tranquility are not maintained when righteousness is not maintained. The righteousness of the chiefs and the people is the only basis for maintaining the laws of the government.”¹³

From the premise that governance could be formed and established to acknowledge and protect the rights of all the people and their property, it was said to follow that laws should be enacted to maintain a society for the benefit of all and not the few. Richards asserted, “God did not establish man as servants for the government leaders and as a means for government leaders to become rich. God provided for the occupation of government leaders in order to bless the people and so that the nation benefits.”¹⁴ Wayland’s theory of cooperative capitalism, which presupposed private ownership of land and a free market as the foundation of political economy, was hindered at the time because the Kingdom was still in a feudal state of ownership as it had been since Kamehameha I. So the full application of Wayland’s political economy, at this point, could not be fully realized until the people could possess freehold titles, e.g. fee-simple and life estates. In the meantime, personal property and agriculture formed the basis of the Hawaiian economy. According to an 1840 statute, making direct reference to Richards’ 1839 instructional book that translated Wayland’s Political Economy into the Hawaiian language:

¹⁰ K.B. Smellie, *A Hundred Years of English Government* (1950), 8.

¹¹ Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* (2003) 154.

¹² William Richards, "William Richards' Report to the Sandwich Islands Mission on His First Year in Government Service, 1838-1839," *Fifty-first Annual Report of the Hawaiian Historical Society for the Year 1942* (1943), 66.

¹³ William Richards, *No ke Kalai 'aina* (Lahaina: Lahainaluna High School Press, 1840), 123. “Aole hoi e mau ka malu ana a me ka kuapapa nui ana o ka aina ke malama ole ia ka pono. O ka pono o na ‘lii a me na kanaka, o ia wale no ke kumu e paa ai na kanawai a me ke aupuni.” Translation by Keao NeSmith, University of Hawai‘i at Manoa.

¹⁴ *Id.*, 64. “Aole i honoho mai ke Akua in a kanaka i poe hana na na ‘lii a i mea e waiwai ai na ‘lii. Ua haawi mai ke Akua i ka oihana alii mea e pomaikai ai na kanaka i mea hoi e pono ai ka aina.” Translation by Keao NeSmith, University of Hawai‘i at Manoa.

The business of the Governors, and land agents [Konohiki], and tax officers of the general tax gatherer, is as follows: to read frequently this law to the people on all days of public work, and thus shall the landlords do in the presence of their tenants on their working days. Let every one also put his own land in a good state, with proper reference to the welfare of the body, according to the principles of Political Economy. The man who does not labor enjoys little happiness. He cannot obtain any great good unless he strives for it with earnestness. He cannot make himself comfortable, not even preserve his life unless he labor for it. If a man wish to become rich, he can do it in no way except to engage with energy in some business. Thus Kings obtain kingdoms by striving for them with energy.”¹⁵

CONSTITUTIONAL EVOLUTION

On June 7, 1839, Kamehameha III proclaimed an expanded uniform code of laws for the kingdom that was preceded by a “Declaration of Rights.” The Declaration formally acknowledged and vowed to protect the *natural rights* of life, limb, and liberty for both chiefs and people. The code provided that “no chief has any authority over any man, any farther than it is given him by specific enactment, and no tax can be levied, other than that which is specified in the printed law, and no chief can act as a judge in a case where he is personally interested, and no man can be dispossessed of land which he has put under cultivation except for crimes specified in the law.”¹⁶ The following year on October 8th, Kamehameha III granted the first Constitution incorporating the Declaration of Rights as its preamble.

The purpose of a written constitution “is to lay down the general features of a system of government and to define to a greater or less extent the powers of such government, in relation to the rights of persons on the one hand, and on the other...in relation to certain other political entities which are incorporated in the system.”¹⁷ The first constitution did not provide for separation of powers, e.g. executive, legislative and judicial, and the prerogatives of the Crown permeated every facet of governance. The Crown’s duty was to execute the laws of the land, serve as chief judge of the Supreme Court, and sit as a member of the House of Nobles who would enact laws together with representatives chosen from the people. The granting of the first constitution by Kamehameha III was not a limitation, per se, of abusive power, but an incorporation of sharing power. By that instrument he “declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government.”¹⁸ According to Justice Robertson, on behalf of the entire Supreme Court,

King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having

¹⁵ William Richards, *Translation of the Constitution and Laws of the Hawaiian Islands, established in the reign of Kamehameha III* (1842), 28. The quoted text is a translation from the Hawaiian text of Richards’ *No Ke Kalaaina*, 127.

¹⁶ *Id.*, 68.

¹⁷ Edward S. Corwin, "Constitution v. Constitutional Theory," *The American Political Science Review* 19, no. 2 (1925): 290-304, 291.

¹⁸ *In the Matter of the Estate of His Majesty Kamehameha IV*, 3 Haw. 715, 720 (1864).

reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed.¹⁹

The role of the Prime Minister established by Kamehameha I in 1794 was for all intents and purposes a misnomer. There were no other ministers that ran government by direction of a primary minister appointed by the Crown until 1845, when a cabinet ministry was established for the first time by statute.²⁰ Prior to 1845, Hawaiian governance did not experience, as the British did, the function of ministers in administering government separate from the Crown. According to Carter, the first prototype of the modern Prime Minister emerged during reigns of the first two Hanoverian Kings, George I and II.²¹ George I had little interest in English politics nor a grasp of the English language, and often returned to Hanover and left the country to be run by his cabinet ministers who were led by Sir Robert Walpole and Lord Townsend. Shortly after the ascension of George II, Townsend resigned, and Walpole was able to gain full control of the cabinet ministry, thereby creating the “office of Prime Minister” that “made possible the evolution of the modern system of ministerial responsibility.”²² The role of the Hawaiian Prime Minister (Kalaimoku) under Kamehameha I, was primarily as an agent at will of the Crown on matters of national governance. It was an idiosyncrasy of Hawaiian governance, that the title Prime Minister would be replaced with Premier (Kuhina Nui) after the death of Kamehameha I. According to the First Act of Kamehameha III passed by the Hawaiian Legislature in 1845, the Premier, in addition to the duties enumerated in the constitution, headed the cabinet ministry as Minister of the Interior and from this point on was a prime minister in the truest sense of the title. The duties of the Premier, as provided by constitutional provision include:

All business connected with the special interests of the kingdom, which the King wishes to transact, shall be done by the Premier under the authority of the King. All documents and business of the kingdom executed by the Premier, shall be considered as executed by the King's authority. All government property shall be reported to him (or her) and he (or she) shall make it over to the King. The Premier shall be the King's special counselor in the great business of the kingdom. The King shall not act without the knowledge of the Premier, nor shall the Premier act without the knowledge of the King, and the veto of the King on the acts of the Premier shall arrest the business. All important business of the kingdom which the King chooses to transact in person, he may do it but not without the approbation of the Premier.²³

Hawaiian Independence and the Question of British Sovereignty

Since the meeting of the Sandwich Islands delegation with King George IV in 1824, the only British policy regarding the kingdom appears to have been the secret instructions given to Lord Byron. But these instructions apparently were not communicated either to Kamehameha III or to the successors of the British Crown, namely King William IV and Queen Victoria. After the temporary occupation by French troops under the command of Captain Laplace in 1839, a member

¹⁹ *Rex v. Joseph Booth*, 3 Haw. 616, 630 (1863).

²⁰ "Statute Laws of His Majesty Kamehameha III," *Hawaiian Kingdom*, Vol. I (1846), 2.

²¹ Bryum Carter, *The Office of Prime Minister* (Princeton: Princeton University Press, 1956), 22.

²² A. Berriedale Keith, *The King and the Imperial Crown: The Powers and Duties of His Majesty* (1936), 64.

²³ "Hawaiian Consitution" (1840).

of the British House of Commons, Lord Ingestrie, called upon the Secretary of State for Foreign Affairs, Lord Palmerston, to provide an official response on the matter. He also “desired to be informed whether those islands which, in the year 1794, and subsequently in the year 1824, . . . had been declared to be under the protection of the British Government, were still considered . . . to remain in the same position.”²⁴ In response, Lord Palmerston acknowledged there was no report on the situation with the French, and with regard to the protectorate status of the Islands “he was non-committal and seemed to indicate that he knew very little about the subject.”²⁵ To the Hawaiian government, Lord Palmerston’s report politically dispelled the notion of British dependency and admitted Hawaiian independence.²⁶ A clearer British policy toward the Hawaiian Islands by Lord Palmerston’s successor, Lord Aberdeen, two years later reinforced the position of the Hawaiian government. In a letter to the British Admiralty on October 4, 1842, Viscount Canning, on behalf of Lord Aberdeen, wrote:

Lord Aberdeen does not think it advantageous or politic, to seek to establish a paramount influence for Great Britain in those Islands, at the expense of that enjoyed by other Powers. All that appears to his Lordship to be required, is, that no other Power should exercise a greater degree of influence than that possessed by Great Britain.²⁷

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent state under international law. He sought the formal recognition of Hawaiian independence from the three naval powers of the world at the time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys, Timoteo Ha‘alilio, William Richards, and Sir George Simpson, a British subject. Of all three powers, it was the British that had a legal claim over the Hawaiian Islands through cession by Kamehameha I, but for political reasons could not openly exert its claim over and above the other two naval powers. Due to the islands prime economic and strategic location in the middle of the north Pacific, the political interest of all three powers was to ensure that none would have a greater interest than any other. This caused Kamehameha III “considerable embarrassment in managing his foreign relations, and . . . awakened the very strong desire that his Kingdom shall be formally acknowledged by the civilized nations of the world as a sovereign and independent State.”²⁸

While the envoys were on their diplomatic mission, a British Naval ship, HBMS *Carysfort*, under the command of Lord Paulet, entered Honolulu harbor in February 1843, making outrageous demands on the Hawaiian government. Basing his actions on certain complaints made to him in letters from the British Consul Richard Charlton, who was absent from the kingdom at the time. Paulet eventually seized control of the Hawaiian government on February 25, 1843, after threatening to level Honolulu with cannon fire.²⁹ Kamehameha III was forced to surrender the kingdom but did so under written protest and pending the outcome of the mission of his diplomats in Europe. News of Paulet’s action reached Admiral Thomas of the British Admiralty, and the

²⁴ Kuykendall, *supra* note 2, 185.

²⁵ *Id.*

²⁶ Robert C. Wyllie, "Report of the Minister of Foreign Affairs," *Foreign Affairs, Hawaiian Kingdom* (1845), 7.

²⁷ Historical Commission, *Report of the Historical Commission of the Territory of Hawai‘i for the two years ending December 31, 1824*, Historical Commission, Territory of Hawai‘i (1925), 36.

²⁸ "Executive Documents on Affairs in Hawaii: 1894-95," *U.S. House of Representatives, 53rd Congress* (1895), 42.

²⁹ Kuykendall, *supra* note 2, 214.

latter sailed from the Chilean port of Valparaiso and arrived in the islands in July 1843. After a meeting with Kamehameha III, Admiral Thomas determined that Charlton's complaints did not warrant a British takeover and ordered the restoration of the Hawaiian government, which took place in a grand ceremony on July 31, 1843.³⁰ At a thanksgiving service after the ceremony, Kamehameha III proclaimed before a large crowd, *ua mau ke 'ea o ka 'aina i ka pono* (the life of the land is perpetuated in righteousness). The King's statement became the national motto of the country.

By 1843, the Hawaiian envoys succeeded in their mission of securing international recognition of the Hawaiian Islands "as a sovereign and independent State." Great Britain and France explicitly and formally recognized Hawaiian sovereignty on November 28, 1843 by joint proclamation at the Court of London, and the United States followed on July 6, 1844 by letter of Secretary of State John C. Calhoun to the Hawaiian envoys.³¹ The Hawaiian Islands was the first Polynesian and non-European nation to be recognized as an independent and sovereign State. The Anglo-French proclamation stated:

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 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 [Hawaiian 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).³²

As a recognized State, the Hawaiian Islands became a full member of the Universal Postal Union on January 1, 1882, maintained more than ninety legations and consulates throughout the world,³³ and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States.³⁴ Regarding the United States, the Hawaiian Kingdom entered into four treaties: 1849 Treaty of Friendship, Commerce and Navigation;³⁵ 1875 Treaty of Reciprocity;³⁶ 1883 Postal Convention Concerning Money Orders;³⁷ and the 1884 Supplementary Convention to the 1875 Treaty of

³⁰ *Id.*, 220.

³¹ Wyllie, *supra* 26, 4.

³² *Executive Documents*, 120. Reprinted in *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

³³ Hawaiian Almanac and Annual, "Hawaiian Register and Directory for 1893," *Hawaiian Almanac and Annual*, 1892, 140.

³⁴ These treaties, except for the 1875 Hawaiian-Austro/Hungarian treaty, which is at the Hawai'i Archives, can be found in Elele, *Treaties and Conventions Concluded between the Hawaiian Kingdom and other Powers, since 1825* (Honolulu: Elele Book, Card and Job Print, 1887): Belgium (Oct. 4, 1862) at 71; Bremen (March 27, 1854) at 43; Denmark (Oct. 19, 1846) at 11; France (July 17, 1839, March 26, 1846, September 8, 1858), at 5, 7 and 57; French Tahiti (Nov. 24, 1853) at 41; Germany (March 25, 1879) at 129; Great Britain (Nov. 13, 1836 and March 26, 1846) at 3 and 9; Great Britain's New South Wales (March 10, 1874) at 119; Hamburg (Jan. 8, 1848) at 15; Italy (July 22, 1863) at 89; Japan (Aug. 19, 1871, January 28, 1886) at 115 and 147; Netherlands (Oct. 16, 1862) at 79; Portugal (May 5, 1882) at 143; Russia (June 19, 1869) at 99; Samoa (March 20, 1887) at 171; Spain (Oct. 9, 1863) at 101; Sweden and Norway (April 5, 1855) at 47; and Switzerland (July 20, 1864) at 83.

³⁵ 9 U.S. Stat. 977. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115.

³⁶ 19 U.S. Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126.

³⁷ 23 U.S. Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129.

Reciprocity.³⁸ The Hawaiian Kingdom was also recognized within the international community as a neutral State as expressly stated in treaties with the Kingdom of Spain in 1863 and the Kingdom of Sweden and Norway in 1852. Article XXVI of the 1863 Hawaiian-Spanish treaty, for example, provides:

All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, *in time of war the neutrality of the Hawaiian Islands*, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands.³⁹ (emphasis added)

The British government lauded Admiral Thomas' action and by its act of formal recognition of Hawaiian independence, the British government relinquished any and all legal claims over the Hawaiian Islands, whether by discovery or by formal cession from Kamehameha I. As an independent State, the Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with the rapidly changing political, social and economic tides that showed no signs of receding from its shores.

Formalizing Hawaiian Law

In 1845 Kamehameha III refocused his attention toward domestic affairs and the organization and maintenance of the newly established constitutional monarchy. This was a critical time for the Kingdom to maintain its independence. On October 29th of that year, he commissioned Robert Wyllie of Scotland to be Minister of Foreign Affairs, G.P. Judd, a former missionary, as Minister of Finance, William Richards as Minister of Education, and John Ricord, the only attorney in the kingdom, as Attorney General. All were granted patents of Hawaiian citizenship prior to their appointments. These appointments sparked controversy in the kingdom and renewed concerns of foreign takeover. Responding to a slew of appeals to remove these foreign advisors who replaced native Chiefs, Kamehameha III penned the following letter that was communicated throughout the realm—a letter that speaks to the time and circumstance the kingdom faced:

Kindly greetings to you with kindly greetings to the old men and women of my ancestors' time. I desire all the good things of the past to remain such as the good old law of Kamehameha that "the old women and the old men shall sleep in safety by the wayside," and to unite with them what is good under these new conditions in which we live. That is why I have appointed foreign officials, not out of contempt for the ancient wisdom of the land, but because my native helpers do not understand the laws of the great countries who are working with us. That is why I have dismissed them. I see that I must have new officials to help with the new system under which I am working for the good of the country and of the old men and women of the country. I earnestly desire to give places to the commoners and to the chiefs as they are able to do the work connected with the office. The people who have learned the new ways I have retained. Here is the name of one of them, G.L. Kapeau, Secretary of the Treasury. He understands the work very well, and I wish there were more such men. Among the chiefs Leleiohoku, Paki, and John Young [Keoni Ana] are capable

³⁸ 25 U.S. Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134.

³⁹ Elele, 1863 Spanish Treaty, 108.

of filling such places and they already have government offices, one of them over foreign officials. And as soon as the young chiefs are sufficiently trained I hope to give them the places. But they are not now able to become speakers in foreign tongues. I have therefore refused the letters of appeal to dismiss the foreign advisors, for those who speak only the Hawaiian tongue.⁴⁰

John Ricord arrived in the Hawaiian Islands in 1844 from Oregon and was retained as Special Law Advisor to Kamehameha III. He was an attorney by trade and by all accounts a very able and professional attorney well versed in both the civil law of continental Europe and the common law of both Britain and the United States. Chief Justice Judd stated that Ricord “seems to have been learned in the civil as well as the common law, as a consequence, no doubt, of his residence in Louisiana.”⁴¹ When Ricord arrived in the Islands, the kingdom was only in its fourth year of constitutional governance and the shortcomings of the first constitution began to show. One of his first tasks was establishing a diplomatic code for Kamehameha III and the Royal Court, based on the principles of the 1815 Vienna Conference. “Besides prescribing rank orders,” according to Mykkanen, “the mode of applying for royal audience, and the appropriate dress code, the new court etiquette set the Hawaiian standard for practically everything that constituted the royal symbolism.”⁴²

His second and more important task was to draft a code that better organized the executive and judicial departments, which was submitted to the Legislature for sanction and approval. In a report to the Legislature, Ricord concluded that, “there is an almost total deficiency of laws, suited to the Hawaiian Islands as a recognized nation in reciprocity with others so mighty, so enlightened and so well organized as Great Britain, France, the United States of America, and Belgium. These Powers having received His Majesty into fraternity, it will become your duty to prepare [the King’s] Government to concert in some measure with theirs.”⁴³ Ricord observed that, “the Constitution had not been carried into full effect [and] its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective.”⁴⁴ The underlying issue, however, was what system of law should one “prepare the King’s Government” under? France and Belgium’s government was based on a Civil or Roman law tradition, while the tradition in Great Britain and the United States was the Common law. On this topic, Kamakau recounted Ricord’s view:

The laws of Rome, that government from which all other governments of Europe, Western Asia and Africa descended, could not be used for Hawai‘i, nor could those of England, France or any other country. The Hawaiian people must have laws adapted to their mode of living. But it is right to study the laws of other peoples, and fitting that those who conduct laws offices in Hawai‘i should understand these other laws and compare them to see which are adapted to our way of living and which are not.⁴⁵

⁴⁰ Samuel M. Kamakau, *Ruling Chiefs of Hawaii* (1992), 401.

⁴¹ A.F. Judd, "Early Constitution of the Judiciary of the Hawaiian Islands," *Hawaiian Almanac and Annual for 1889*, 1888: 63-67, 65,

⁴² Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* (2003), 161.

⁴³ John Ricord, *Report of the Attorney General Read Before His Majesty, to the Hawaiian Legislature*, Attorney General, Hawaiian Kingdom (1845), 5.

⁴⁴ *Id.*, 3.

⁴⁵ Samuel M. Kamakau, *Ruling Chiefs of Hawaii* (1992), 402.

Complying with the resolution of the legislature, Attorney General Ricord “submitted at intervals portions of the succeeding code to His Majesty in cabinet council of ministers, where they have first undergone discussion and careful amendment; they have next been transferred to the Rev. William Richards, for faithful translation into the native language, after which, as from a judiciary committee, they have been reported to the legislative council for criticism, discussion, amendment, adoption or rejection.”⁴⁶ These organic laws were based on a hybrid of both civil and common law principles that spanned four hundred forty seven pages and subdivided into parts, chapters, articles and sections. Because the Hawaiian Islands sat at the international crossroads of trade and commerce that spanned across the Pacific Ocean, merchants, from both the civil and common law countries, had influenced the evolution of Hawaiian law since Kamehameha I. Governmental organization leaned toward the principles of English and American common law, infused with some civil law reasoning, but at the very core the was to be Hawaiian.

Land Reform

There is a distinction between title to the territory of a state and title to real property. Title to territory, according to Grotius, is what jurists called *dominium*, being the origin of property or ownership.⁴⁷ And to the State, says Walker, is “reserved the *dominium* and ultimate property in the lands, and the grantee [of real property] acquired only the use and profits.”⁴⁸ This common law maxim derived from the principle that the “state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign.”⁴⁹ Real property, on the other hand, derived from the feudal law, whereby the King granted out the use and profits of the land to his vassals on certain conditions, but retained ownership over them. Any breach of the conditions would cause dispossession and the land would be reallocated to someone else. These feudal possessions came to be known as real property—i.e. fee-simple, life estate and leasehold—and the conditions imposed on real property by the person of the King were gradually replaced by legislative enactments of a modern State—e.g. allegiance, taxes, eminent domain. According to Hawaiian constitutional law, the *dominium* was described as follows.

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. *It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.* Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom (emphasis added).⁵⁰

By statute in 1846, this constitutional provision was interpreted as establishing “three classes of persons having vested rights in the lands—1st, the government, 2nd, the landlord [Konohikis], and 3rd, the tenant [native commoner], it next [became] necessary to ascertain the proportional rights

⁴⁶ "Statute Laws of His Majesty Kamehameha III," *Hawaiian Kingdom*, Vol. I (1846), 6.

⁴⁷ Hugo Grotius, *Grotius on the Rights of War and Peace*, trans. William Whewell (1853), 69.

⁴⁸ James M. Walker, *The Theory of the Common Law* (1852), 13.

⁴⁹ William M. McKinney and Burdett A. Rich, *Ruling Case Law as Developed and Established by the Decisions and Annotations*, Vol. XX (1915), 13.

⁵⁰ "Hawaiian Consitution" (1840).

of each.”⁵¹ When rights are constitutionally vested “they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.”⁵² Fully recognizing this doctrine, Hawaiian Attorney General John Ricord explains:

New laws or amendments of the old, cannot divest rights previously acquired, and, as in other countries, so in this, the repealed ordinances must be resorted to in numerous cases accruing before the repeal or modification. Means and remedies may be altered, but the rights themselves, if vested, cannot be constitutionally disturbed. This is one admitted doctrine of civilized jurisprudence.⁵³

The government held both the *dominium* and original fee-simple title to all the lands, subject to the vested undivided rights of the chiefly and native tenant classes. In order to verify private claims to property since the reign of Kamehameha I, a Board of Commissioners to Quiet Land Titles (Land Commission) was established on December 10, 1845 to investigate, confirm or reject all private claims to fee-simple titles, life estates or leases acquired “anterior” to date of the establishment of the Land Commission to the reign of Kamehameha I.⁵⁴ If the title was confirmed to have been lawfully acquired from Kamehameha I, his successors or agents, whether in fee, for life or for years, it received a Land Commission Award subject to the rights of native tenants.

In 1848, the King in Privy Council initiated the Great Mahele (Division), or land division, in order to “ascertain the proportional rights” of the government, chiefly and native tenant classes. It was agreed upon that in lieu of quitclaiming their undivided right in the *dominium*, each chief would receive a freehold life estate, capable of being converted into a fee-simple, from the government over large tracts of land called ahupua‘a and ‘ili kupono.⁵⁵ During this division, it was understood that the King would participate in his private capacity and not as head of the government. This was reflected in the Privy Council minutes, where it notes the “King now claims to be Konohiki (Chief) of a great portion of the lands. He therefore makes known to the other Konohikis, that they are only holders of Lands under him, but he will only take a part and leave them a part. ...subject only to the rights of the Tenants.”⁵⁶ On December 18, 1847, the following resolution was unanimously passed by the Privy Council, which would not only guide the division process, but also contractually bind the King and the Konohikis to adhere to the rules of the division.⁵⁷

⁵¹ “Statute Laws of His Majesty Kamehameha III,” *Hawaiian Kingdom* (1847), 83.

⁵² Henry Campbell Black, *Black’s Law Dictionary*, 4th ed. (1968), 1753.

⁵³ “Statute Laws of His Majesty Kamehameha III,” *Hawaiian Kingdom*, Vol. I (1846), 4.

⁵⁴ *Id.*, 107.

⁵⁵ W.D. Alexander, “A Brief History of Land Titles in the Hawaiian Kingdom,” Interior Department, Appendix to Surveyor General’s Report to the Hawaiian Legislature (1882), 4-5. An ahupua‘a varies in size and shape, but a typical ahupua‘a “is a long narrow strip, extending from the sea to the mountain, so that its chief may have his share of all the various products of the *uka* or mountain region, the cultivated land, and the *kai* or sea.” And an ili kupono held the same traits as an ahupua‘a despite its origin.

⁵⁶ “Privy Council Minutes,” *Hawaiian Kingdom* (December 11, 1847), 87.

⁵⁷ *Id.*, 129. Before the chiefs received lands they had to first relinquish all claims to lands previously held by them in the following form and signed. “Ke ae aku nei au i keia mahele, ua maikai. No ka Moi is kakau ia maluna. Aohe ou kuleana maloko.” Translation: “I consent to this division it is good. Belonging to the King the lands written above. I have no more rights within.” The signature of the Konohiki signified the evidence of consent and bound the

Whereas, it has become necessary to the prosperity of our Kingdom and the proper physical, mental and moral improvement of our people that the undivided rights at present existing in the lands our Kingdom, shall be separated, and distinctly defined;

Therefore, We Kamehameha III., King of the Hawaiian Islands and His Chiefs, in Privy Council Assembled, do solemnly resolve, that we will be guided in such division by the following rules:

1—His Majesty, our Most Gracious Lord and King, shall in accordance with the Constitution and Laws of the Land, retain all his private lands, as his own individual property, subject only to the rights of the Tenants, to have and to hold to Him, His heirs and successors forever.

2—One-third of the remaining lands of the Kingdom shall be set aside, as the property of the Hawaiian Government subject to the direction and control of His Majesty, as pointed out by the Constitution and Laws, one-third to the chiefs and Konohiki(s) in proportion to their possessions, to have and to hold, to them, their heirs and successors forever, and the remaining third to the Tenants, the actual possessors and cultivators of the soil, to have and to hold, to them, their heirs and successors forever.

3—The division between the Chiefs or Konohiki(s) and their Tenants, prescribed by Rule 2nd shall take place, whenever any Chief, Konohiki or Tenant shall desire such division, subject only to confirmation by the King in Privy Council.

4—The Tenants of His Majesty's private lands, shall be entitled to a fee-simple title to one-third of the lands possessed and cultivated by them; which shall be set off to the said Tenants in fee-simple, whenever His Majesty or any of said Tenants shall desire such division.

5—The division prescribed in the foregoing rules, shall in no wise interfere with any lands that may have been granted by His Majesty or His Predecessors in fee-simple, to any Hawaiian subject or foreigner, nor in any way operate to the injury of the holders of unexpired leases.

6—It shall be optional with any Chief or Konohiki, holding lands in which the Government has a share, in the place of setting aside one-third of the said lands as Government property, to pay into the Treasury one-third of the unimproved value of said lands, which payment shall operate as a total extinguishment of the Government right in said lands.

7—All the lands of His Majesty shall be recorded in a Book entitled "Register of the lands belonging to Kamehameha III., King of the Hawaiian Islands," and deposited with the Registry of Land Titles in the Office of the Minister of the Interior, and all lands set aside, as the lands of the Hawaiian Government, shall be recorded in a Book entitled "Register of the lands belonging to the Hawaiian Government," and fee-simple titles shall be granted to all other allottees upon the Award of the Board of Commissioners to quiet Land Titles.

After assigning life estates to the other Konohikis and requiring them to submit their claims with the Board of Commissioners to Quiet Land Titles for Government sanction, Kamehameha III, as the highest in the Konohiki class, retained nearly 2.5 million acres of land for himself, which he acknowledged that the Government still possessed the fee-simple title in his life estate. Therefore, in order to extinguish the government's interest, he bypassed the Board of Commissioners to Quiet Land Titles and proceeded to go directly before the Legislative Assembly to commute the

Konohiki and his successors to the rules and conditions of the division between themselves and the Government as well as the division with the native tenants.

Government's remainder interest in his lands. According to the Hawaiian Supreme Court *In the matter of the Estate of His Majesty Kamehameha IV* in 1864, the lands held by Kamehameha III after assigning lands to the other Konohikis "were not regarded as his private property strictly speaking. Even before his division with the landlords, a second division between himself and the Government was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the Government in like manner with the lands of the chiefs." The Court continued to state that the "records of the discussion in Council show plainly His Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his property."

On June 7, 1848, the Hawaiian Legislature passed an *Act relating to the lands of His Majesty the King and of the Government*, whereby Kamehameha III relinquished any claim as a Konohiki to nearly 1.5 million acres that remained in his name after the mahele to the Government and the Government thereby released its claim to the remaining 1 million acres of lands of Kamehameha III. This process of commuting the Government's fee-simple interest effectively converted Kamehameha III's life estate to nearly one million acres into fee-simple, but subject to the rights of native tenants. The action by Kamehameha III of commuting the Government's interest for large tracts of land also served as the precedent as to how the other Konohikis would calculate commutation on their life estates.

The granting of freeholds in fee or for life to the Konohiki class did not diminish the government's title to the *dominium* that remained with the state. The *dominium*, however, no longer possessed the undivided vested rights of the chiefly class, but now only the vested rights of the native tenant class.⁵⁸ Native tenants who desired a fee-simple title to land and sought to divide their interest out of the *dominium* could approach the King, in his private capacity as a Konohiki, or any other Konohiki whenever they "desire such division" as prescribed by rules 3 and 4. By virtue of the 1850 Kuleana Act, the Land Commission was empowered by the Government and Konohiki class to grant fee-simple titles to native tenants who were encouraged to submit their claims to divide out their interest when the Mahele was being discussed in Privy Council.⁵⁹ This Act also defined the division for native tenants to be one quarter acre for a house lot and whatever lands lie in actual cultivation.⁶⁰ When the Land Commission statutorily ceased to exist in 1854, the duty of dividing out native tenant rights was resumed by the Government and Konohikis, including the Crown. For those native tenants who were unable to file a claim with the Land Commission, they could divide out their interest on lands held by the Government "in lots from one to fifty acres, in fee-simple" by applying to special agents appointed by the Minister of the Interior.⁶¹ Division between native

⁵⁸ For an expanded discussion on the Great Mahele and the vested rights of native tenants, see Alexander, *Surveyor General's Report*; Perkins, *Teaching Land and Sovereignty*; and Sai, *Kahana bookreview*.

⁵⁹ By Privy Council resolution, December 21, 1849, the Government and Konohiki classes waived their commutation fee of one-third of the unimproved value that would have been payable by the native tenant class in order to acquire their fee-simple title to their entire lands claimed, as well as authorizing the Land Commission to act on their behalf in the division as prescribed by the Mahele rules 3 and 4.

⁶⁰ "An Act Confirming Certain Resolutions of the King and Privy Council, passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges," *Hawaiian Statutes* (August 6, 1850), section 5 & 6.

⁶¹ *Ibid.*, Section 4; and, "An Act to Provide for the Appointment of Agents to Sell Government Lands to the People," *Hawaiian Statutes* (June 16, 1851).

tenants and the Konohikis, which included the Crown, were not regulated by statute as were Government lands, but were prescribed as a condition of title when the Konohikis received their lands under and by virtue of Privy Council resolution of December 18, 1847. The prescribed division was regulated by rule 5. In other words, a native tenant could not divide out their interest within lands already conveyed by the Government or Konohikis, whether in fee, for life or for years, unless the lands have reverted to the same by treason,⁶² remainder,⁶³ or want of heirs.⁶⁴

According to the registry book there were only two hundred fifty-three recognized Konohikis, who bound themselves and their successors to the rules and conditions of the Great Mahele. As a class, the Konohikis made up a finite number affixed to those who were recognized chieftains in the Hawaiian Kingdom, but the native tenant class is ever increasing and is comprised of all natives who were not Konohikis. Native tenants who divided out their interests from the dominium did not affect the vested rights of native tenants who did not divide; *a priori* the right is vested in a class and not a finite number of individuals like the Konohiki class. Therefore, the rights of native tenants exist in perpetuity, and according to Chief Justice William Lee, these rights are “secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself.”⁶⁵ This is the reason why all conveyances in the Hawaiian Islands have the uniform clause in deeds “reserving the rights of native tenants,” or in the Hawaiian language, “koe nae na kuleana o na Kanaka ma loko.” By 1893, native tenants acquired in excess of 150,000 acres of land by purchase of government grants pursuant to the 1850 Kuleana Act.⁶⁶ In fact, the Surveyor General reported to the Legislative Assembly that between “the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives.”⁶⁷

Non-aboriginal Hawaiian subjects were able to acquire freehold estates and leases through government grants and awards by the Land Commission, or by purchase from freeholders themselves. Foreign nationals were initially barred from acquiring fee-simple titles under the 1845 Organic Acts, but this law was later repealed under the “Alien Disability Act” of July 10th 1850. All titles to real property were subject to the following conditions:

1. To punish for high treason by forfeiture, if so the law decrees.
2. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.
3. To encourage and even enforce the usufruct of lands for the common good.
4. To provide public thoroughfares and easements, by means of roads, bridges, streets, &c., for the common good.

⁶² "Penal Code of the Hawaiian Islands," *Hawaiian Kingdom* (1869), section 9, chapter VI: "Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government."

⁶³ A remainderman is a person who inherits the property in fee upon the death of the owner of a life estate.

⁶⁴ "Compiled Laws of the Hawaiian Kingdom (Civil Code)" (1884), 477: "Upon the decease of any person owning, possessed of, or entitled to any estate of inheritance or kuleana in any land or lands in this Kingdom, leaving no kindred surviving, all such land and lands shall thereupon escheat and revert to the owner of the Ahupuaa, Ili or other denomination of land, of which such escheated kuleana had originally formed a part."

⁶⁵ *Kekiekie v. Dennis*, 1 Haw. 69 (1851); see also *Kukiiahu v. William Gill*, 1 Haw. 90 (1851).

⁶⁶ Perkins, *Teaching Land and Sovereignty*, 100.

⁶⁷ Alexander, *Surveyor General's Report*, 24.

5. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.⁶⁸

These acts effectively brought to a close the feudal state of land tenure in the Hawaiian Islands, and Richards' teachings laid the foundation for a new political economy and constitutional change.

The Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim.⁶⁹

1852 Constitution

In 1851, the Legislature passed a resolution calling for the appointment of three commissioners, one to be chosen by the King, one by the Nobles, and one by the Representatives, to propose amendments to the constitution, whose duty was to revise the Constitution of 1840. The commission, headed by William Lee from the House of Representatives, followed the structure and organization provided for by the Massachusetts Constitution of 1780. The Massachusetts constitution was the most advanced of any constitution of the time and was organized into four parts: a preamble; a declaration of rights; a framework of government describing the legislative, executive and judicial organs; and an amendment article. The draft of the revised Constitution was submitted to the Legislature and approved by both the House of Nobles and the House of Representatives and signed into law by the King on June 14, 1852.⁷⁰

The amended constitution did not have a preamble, but was organized in the same manner as the Massachusetts constitution, with the exception of the order of the form of government: a declaration of rights; a framework of government that described the functions of the executive subdivided into five sections, the legislative, and judicial powers; and an article describing the mode of amending the constitution. According to Hegel's theory of a constitutional monarchy, the "three powers of a modern [constitutional monarchy] have distinct functions but are not completely separate. As part of an interdependent whole, each power is defined not only by its own particular function, but also by the other powers which limit and interact with it."⁷¹ The constitution, though, retained remnants of absolutism as a carryover of the former constitution. In other words, by constitutional provision, the Crown was capable of altering the constitution or even cession of the kingdom to a foreign state without legislative approval. These provisions would allow the King to act swiftly in a dire situation should circumstances demand. In particular, these provisions of the 1852 constitution included:

⁶⁸ Statute Laws (vol. I), 85.

⁶⁹ *Id.*, 86.

⁷⁰ Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* (1918), 36.

⁷¹ Bernard Yack, "The Rationality of Hegel's Concept of Monarchy," *American Political Science Review* 74, no. 3 (1980): 709-720, 713.

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.

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.

Tensions with France

These provisions were retained particularly because there had been tenuous relations with France since 1839, when French Captain Laplace exacted \$20,000.000 from Kamehameha III as surety to prevent the persecution of Catholics. Laplace also forced the King to sign another treaty imposing jury selection benefits to Frenchmen and a fixed duty on French wine and brandies. On March 21, 1846, French Rear Admiral Hamelin who arrived in the islands on the 22nd on the frigate *Virginie*, returned the four boxes containing the \$20,000.00 to the Hawaiian government.⁷² Three days later, Kamehameha III reluctantly signed two identical treaties with the French and British that reiterated the Laplace treaty's provision of jury selection and a cap on duties on "wines, brandies, and other spirituous liquors" from both countries. These treaties superseded the British 1836 treaty and the French 1839 treaty, and contained "two objectionable clauses, which proved to be a fruitful source of trouble in subsequent years."⁷³

ARTICLE III. No British [French] subject accused of any crime whatever shall be judged otherwise than by a jury composed of native or foreign residents, proposed the British [French] Consul and accepted by the Government of the Sandwich Islands.

ARTICLE VI. British [French] merchandise or goods recognized as coming from the British [French] dominions, shall not be prohibited, nor shall they be subject to an import duty higher than five per cent ad valorem. Wines, brandies, and other spirituous liquors are however excepted from the stipulation, and shall be liable to such reasonable duty as the Hawaiian Government may think; fit to lay upon them, provided always that the amount of duty shall not be so high as absolutely to prohibit the importation of the said articles.

Tension again arose with the French in August 1849, when Consul Dillon accused the Hawaiian government of violating the 1846 French treaty. Admiral De Tromelin, who arrived in the islands on August 12th on board the French frigate *Poursuivante*, "sent the king a peremptory dispatch containing ten demands which had been drawn up by Mr. Dillon."⁷⁴ These again centered on the treatment of Catholics, the duty on spirituous liquors, and the unequal treatment of Frenchmen. The Hawaiian government sent a courteous, yet firm, reply explaining that it had not violated the treaty and that if any rights of French citizens have been violated,

the courts of the kingdom were open for the redress of all such grievances, and that until justice had been denied by them there could be no occasion for diplomatic interference.

⁷² W.D. Alexander, *A Brief History of the Hawaiian People* (1891), 261.

⁷³ *Id.*

⁷⁴ *Id.*, 266.

The government offered to refer any dispute to the mediation of a neutral power, and informed the admiral that no resistance would be made to the force at his disposal, and that in any event the persons and property of French residents would be scrupulously guarded.⁷⁵

Undeterred by reason and fairness, De Tromelin landed a fully armed force in Honolulu and took possession of the government fort, “the customhouse and other government buildings, and seized the king’s yacht, together with seven merchant vessels in port.”⁷⁶ The fort had previously been abandoned and the Hawaiian government provided no opposition to the landing of French troops. By proclamation of the Admiral on the 30th, the ten-day occupation and the destruction of the fort was justified under France’s international right of reprisal, but private property would be restored. The two French warships left Honolulu for San Francisco on September 5, 1849, with the French consul Dillon and his family. Louis Perrin replaced Dillon as French consul and arrived in Honolulu on December 13, 1850. To the government’s surprise, the French consul presented the same demands as had Dillon and resumed his “policy of an annoying diplomatic interference with the internal affairs of the kingdom.”⁷⁷ As a result, the King and Premier placed the kingdom temporarily under the protection of the United States, which greatly diminished the annoyance exhibited by the French consul.⁷⁸

These events and other threats to the safety of the kingdom caused great trepidation amongst the King and other governmental officials and constituted the driving force behind the prospect of ceding the Hawaiian Islands to the United States. By 1853, the topic of annexation to the United States was a subject of serious deliberation by the King who “was tired of demands made upon him by foreign powers, and of threats by filibusters from abroad and by conspirators at home to overturn the government.”⁷⁹ On February 16, 1854, the King “commanded Mr. Wyllie [Minister of Foreign Affairs] to ascertain on what terms a treaty of annexation could be negotiated, to be used as a safeguard to meet any sudden emergency.”⁸⁰ Negotiations between Wyllie and the American commissioner David L. Gregg were not successful and the prospect of annexation came to a close upon the death of Kamehameha III on December 15, 1854. Despite open threats to the kingdom, Kamehameha III successfully transformed Hawaiian governance from a feudal autocracy to the edifice of constitutional government that recognized a uniform rule of law and acknowledged and protected the rights of its citizenry.

The age of Kamehameha III was that of progress and of liberty—of schools and of civilization. He gave us a Constitution and fixed laws; he secured the people in the title to their lands, and removed the last chain of oppression. He gave them a voice in his councils and in the making of the laws by which they are governed. He was a great national benefactor, and has left the impress of his mild and amiable disposition on the age for which he was born.⁸¹

⁷⁵ *Id.*, 267.

⁷⁶ *Id.*, 268.

⁷⁷ *Id.*, 270.

⁷⁸ *Id.*

⁷⁹ *Id.*, 277.

⁸⁰ *Id.*, 278.

⁸¹ Kamehameha IV, *Speeches of His Majesty Kamehameha IV to the Hawaiian Legislature* (1861), 5.

Alexander Liholiho succeeded to the throne as Kamehameha IV. He was the adopted son of the King, and was confirmed successor on April 6, 1853, in accordance with Article 25 of the Constitution of 1852.⁸² Article 25 provided that the “successor [of the Throne] shall be the person whom the King and the House of Nobles shall appoint and publicly proclaim as such, during the King's life.” The first year of his reign he approved an Act to separate the office of Kuhina Nui from that of Minister of Interior Affairs. The legislature reasoned that the “Kuhina Nui is invested by the Constitution with extraordinary powers, and whereas the public exigencies may require his release from the labor, and responsibilities of the office of Minister of Interior Affairs, now by law imposed upon him.”⁸³ In 1855, the Department of Public Instruction was established, by statute, replacing the ministry of Public Instruction whose minister formerly served as a member of the cabinet council. This independent department was headed by a President who presided over a five member Board of Education that was “superintended and directed by a committee of the Privy Council.”⁸⁴ From this point, the cabinet consisted of the Minister of the Interior, Minister of Finance, Minister of Foreign Affairs, and the Attorney General.⁸⁵ It was also the “duty of the Board of Education, every sixth year, counting from the year 1860, to make a complete census of the inhabitants of the Kingdom, to be laid before the King and Legislature for their consideration.”⁸⁶ The constitution was also amended in 1856, which changed legislative sessions from annual to biennial. Regarding those sovereign prerogatives of absolutism retained in the constitution, Kamehameha IV sought to rid these prerogatives by constitutional amendment, but was unsuccessful. The responsibility for such change would fall on his successor and brother, Lot Kapuaiwa.

On November 30, 1863, Kamehameha IV died unexpectedly, and left the Kingdom without a successor.⁸⁷ On the very same day, the Premier, Victoria Kamamalu, in Privy Council, proclaimed Lot Kapuaiwa to be the successor to the Throne in accordance with Article 25 of the Constitution of 1852, and received confirmation by the Nobles. He was thereafter styled Kamehameha V. Article 47, of the Constitution of 1852, provided that “whenever the throne shall become vacant by reason of the King's death the Kuhina Nui shall perform all the duties incumbent on the King, and shall have and exercise all the powers, which by this Constitution are vested in the King.” In other words, Victoria Kamamalu provided continuity for the office of the Crown pending the appointment and confirmation of Kapuaiwa. Upon his ascension, Kamehameha V refused to take the oath of office until the 1852 Constitution was altered in order to remove those sovereign prerogatives that ran contrary to the principles of a constitutional monarchy, namely Articles 45 and 94.⁸⁸

⁸² Lydecker, *Roster Legislatures*, 49.

⁸³ "An Act to Separate the Office of Kuhina Nui from that of Minister of Interior Affairs," *Hawaiian Statutes* (January 6, 1855).

⁸⁴ Compiled Laws, 199.

⁸⁵ After John Ricord left the kingdom in 1847, the office of Attorney General was not filled until 1862 with the appointment of Charles C. Harris. During this period the District Attorneys throughout the islands performed the functions of the office.

⁸⁶ Compiled Laws, 211.

⁸⁷ On October 3, 1859, in an Extraordinary Session of the House of Nobles, Kamehameha IV received confirmation from the Nobles that his minor son, Prince Albert, was to be the successor of the Hawaiian Throne in accordance with Article twenty-five of the 1852 constitution. The young Prince died August 19th 1862, leaving the Kingdom without a successor to the throne.

⁸⁸ Lydecker, *Roster Legislatures*, 99.

Apparently, Kamehameha V knew that his refusal to take the oath was constitutionally authorized by Article 94 of the Constitution, which provided that the “King, after approving this Constitution, shall take the following oath.” This provision implied a choice as to whether to take the oath, which Kamehameha V felt should be constitutionally altered and made mandatory. Kamehameha V was convinced that these anomalous provisions, which needed altering, were not just problematic to him, but also a source of great difficulty for his late brother Kamehameha IV and the Legislative Assembly. If he did take the oath, he would have bound himself to the constitution whereby any change or amendment to the constitution was vested solely with the Legislative Assembly. By not taking the oath, he reserved to himself the responsibility of change, which ironically was authorized by the very constitution he sought to amend.

1864 Constitution

Kamehameha V and his predecessor recognized Articles 39, 45 and 94 as a hindrance to responsible government, and this formed the main basis for the King to convene the first constitutional convention whose duty was to draft a new constitution. In Privy Council, the King resolved to look into the legal means of convening the first Constitutional Convention under Hawaiian law, and on July 7, 1864 the convention convened.⁸⁹ Between July 7th and August 8th 1864, each article in the proposed Constitution was read and discussed until the convention arrived at Article 62. In this article, the King and Nobles wanted to insert property qualifications for representatives and their electorate, but the elected delegates refused. After days of debate over this article, the Convention arrived at an absolute deadlock. The elected delegates could not come to agree on this article. As a result, Kamehameha V dissolved the convention and exercising his sovereign prerogative by virtue of Article 45, he annulled the 1852 constitution and proclaimed a new constitution on August 20, 1864.

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 specific 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.”⁹⁰ The constitution proclaimed was not new, but rather the same draft that was before the convention with the exception of the property qualifications for representatives⁹¹ and their electorate.⁹² The legislature later repealed the property qualifications in 1874, but maintained

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ "Hawaiian Constitution" (1864), Article 61: “No person shall be eligible for a Representative of the People, who is insane or an idiot; nor unless he be a male subject of the Kingdom, who shall have arrived at the full age of Twenty-One years—who shall know how to read and write—who shall understand accounts—and shall have been domiciled in the Kingdom for at least three years, the last of which shall be the year immediately preceding his election; and who shall own Real Estate, within the Kingdom, of a clear value, over and above all incumbrances, of at least Five Hundred Dollars; or who shall have an annual income of at least Two Hundred and Fifty Dollars; derived from any property, or some lawful employment.”

⁹² "Hawaiian Constitution" (1864), Article 62: “Every male subject of the Kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall be possessed of Real Property in this Kingdom, to the value over and above all incumbrances of One Hundred and Fifty Dollars of of a Lease-hold property on which the rent is Twenty-five Dollars per year—or of an income of not less than Seventy-five Dollars per year, derived from any property or

literacy as the only qualification. The office of Premier was eliminated, and the constitution provided that no act of the Monarch was valid unless countersigned by a responsible Minister from the Cabinet, who was answerable to the Legislative Assembly regarding matters of removal by vote of a lack of confidence or impeachment proceedings. The function of the Privy Council was greatly reduced, and a Regency replaced the function of Premier should the King die, leaving a minor heir, who would “administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King.”⁹³ The Crown, by constitutional provision, was bound to take the oath of office upon ascension to the throne, and the sole authority to amend or alter the constitution was the Legislative Assembly, which was now a unicameral body comprised of appointed Nobles and Representatives elected by the people sitting together. The constitution also provided that the “Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial; these shall always be preserved distinct.”⁹⁴

The constitution, and the method by which it came about, has been erroneously labeled as a *coup d'état* that sought to increase the power of the Crown.⁹⁵ Nothing could be further from the truth. In fact, the 1864 Legislative Assembly appointed a special committee, which was comprised of Godfrey Rhodes, John I‘i, and J.W.H. Kauwahi to respond to Kamehameha V’s speech opening the new legislature. The committee recognized the constitutionality of the King’s prerogative under the former constitution and acknowledged that 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.”⁹⁶ In other words, the Crown was not only authorized by law to do what had been done, but the action of Kamehameha V further limited his own authority under the former constitution. He was the last Monarch to have exercised a remnant of absolutism.

On December 11, 1872, Kamehameha V died without naming a successor to the Throne, and the Legislative Assembly, being empowered to elect a new monarch in accordance with the 1864 constitution, elected William Charles Lunalilo on January 8, 1873. The Hawaiian Kingdom’s first elected King died a year later without a named successor, and the Legislature once again convened and elected David Kalakaua as King on February 12, 1874. On February 14, 1874, King Kalakaua appointed his younger brother, Prince William Pitt Leleiohoku, his successor, but he died April 10, 1877. The next day he appointed his sister, Princess Lili‘uokalani, as heir apparent and received confirmation from the Nobles. When Kalakaua was elected, a new *stirps* replaced the Kamehameha *stirps* which comprised of Princess Lili‘uokalani, Queen Kapiolani, Princess Virginia Kapo‘oloku Po‘omaikelani, Princess Kinoiki, Princess Victoria Kawekiu Kai‘ulani Lunalilo

some lawful employment, and shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters of his District as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that District. Provided, however, that no insane or idiotic person, nor any person who shall have been convicted of any infamous crime within this Kingdom, unless he shall have been pardoned by the King, and by the terms of such pardon have been restored to all the rights of a subject, shall be allowed to vote.”

⁹³ "Hawaiian Constitution" (1864), Article 33.

⁹⁴ "Hawaiian Constitution" (1864), Article 20.

⁹⁵ Kuykendall, *The Hawaiian Kingdom: 1854-1874*, 133.

⁹⁶ John I‘i, J.W.H. Kauwahi and Godfrey Rhodes, "Reply to His Majesty’s 1864 Address at the Opening of the Legislature" (Hawaiian Legislature).

Kalaninuiāhīlāpalapa, Prince David Kawanānakoā, Prince Edward Abner Keliāhonui, and Prince Jonah Kuhio Kalānianaʻole.

On August 9, 1880, a Board of Genealogists of Hawaiian Chiefs was established by statute to “collect from genealogical books, and from the knowledge of old people the history and genealogy of the Hawaiian chiefs, and shall publish a book of the doings of such Board.”⁹⁷ The Board was also tasked with the duty of “establishing the arms and insignia of chief families, searching for ancient relics which have been lost or concealed in places of concealment, and for ascertaining and preserving from violation the ancient places of sepulture of the chiefs.”⁹⁸ In the preamble of the statute it states, “Whereas, it is provided by the 22d article of the Constitution that the Kings of Hawaii shall be chosen from the native chiefs of the Kingdom; and whereas, at the present day it is difficult to ascertain who are the chiefs, as contemplated by said article of the Constitution, and it is proper that such genealogies of the Kingdom be perpetuated, and also the history of the chiefs and kings from ancient times down to the present day, which would also be a guide to the King in the appointment of Nobles in the Legislative Assembly.”⁹⁹ Between April 20th and November 30, 1896, the Board published the genealogies of Chiefs living at the time in the *Ka Makaʻainana* newspaper under the heading “Moʻokuʻauhau Aliʻi.” Those chiefs and their direct descendants are Chiefs of the realm and capable of serving as an elected Monarch should the Kalakaua *stirps* come to an end, as well as serving as Nobles in the Legislative Assembly.

1887 REVOLUTION

During the summer of 1887, while the Legislature remained out of session, a minority of subjects of the Hawaiian Kingdom and foreign nationals met to organize a takeover of the political rights of the native population. The driving motivation for these revolutionaries was their belief that the “native [was] unfit for government and his power must be curtailed.”¹⁰⁰ A local volunteer militia, whose members were predominantly United States citizens, called themselves the Hawaiian League, and held a meeting on June 30, 1887 in Honolulu at the Armory building of the Honolulu Rifles. Before this meeting, large caches of arms were brought in by the League from San Francisco and dispersed amongst its members.¹⁰¹

The group made certain demands on Kalakaua and called for an immediate change of the King’s cabinet ministers. Under threat of violence, the King reluctantly agreed on July 1, 1887 to have this group form a new cabinet ministry made up of League members. The purpose of the league was to seize control of the government for their economic gain, and to neutralize the power of the native vote. On that same day the new cabinet comprised of William L. Green as Minister of Finance, Godfrey Brown as Minister of Foreign Affairs, Lorrin A. Thurston as Minister of the Interior, and Clarence W. Ashford as Attorney General, took “an oath to support the Constitution and Laws, and faithfully and impartially to discharge the duties of his office.”¹⁰² Under strict secrecy and unbeknownst to Kalakaua, the new ministry also invited two members of the Supreme

⁹⁷ Compiled Laws, 638.

⁹⁸ *Id.*, 639.

⁹⁹ *Id.*, 638.

¹⁰⁰ Executive Documents, 574.

¹⁰¹ *Id.*, 579.

¹⁰² Compiled Laws, 8.

Court, Chief Justice Albert F. Judd and Associate Justice Edward Preston, “to assist in the preparation of a new constitution,”¹⁰³ which now implicated the two highest ranking judicial officers in the revolution.

Hawaiian constitutional law provided that any proposed change to the constitution must be submitted to the “Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof”¹⁰⁴ it would be deferred to the next Legislative session for action. Once the next legislature convened, and the proposed amendment or amendments have been “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.”¹⁰⁵ As a minority, these individuals had no intent of submitting their draft constitution to the legislature, which was not scheduled to reconvene until 1888. Instead, they embarked on a criminal path of treason. The Hawaiian Penal Code defines *treason* “to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King’s government...the same being done by a person owing allegiance to this kingdom. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.”¹⁰⁶ The statute goes on to state that in order to

constitute the levying of war, the force must be employed or intended to be employed for the dethroning or destruction of the King or in contravention of the laws, or in opposition to the authority of the King’s government, with an intent or for an object affecting some of the branches or departments of said government generally, or affecting the enactment, repeal or enforcement of laws in general, or of some general law; or affecting the people, or the public tranquility generally; in distinction from some special intent or object affecting individuals other than the King, or a particular district.¹⁰⁷

The Bayonet Constitution

The draft constitution was completed in just five days. The King was forced to sign on July 6th and, thereafter, the 1887 Constitution presumably annulled the former constitution and was declared to be the new law of the land. The King’s sister and heir-apparent, Lili‘uokalani, discovered later that her brother had signed the constitution “because he had every assurance, short of actual demonstration, that the conspirators were ripe for revolution, and had taken measures to have him assassinated if he refused.”¹⁰⁸ Gulick, who served as Minister of the Interior from 1883 to 1886, also concluded:

The ready acquiescence of the King to their demands seriously disconcerted the conspirators, as they had hoped that his refusal would have given them an excuse for deposing him, and a show of resistance a justification for assassinating him. Then everything would have been plain sailing for their little oligarchy, with a sham republican constitution.¹⁰⁹

¹⁰³ Merze Tate, *The United States and the Hawaiian Kingdom: A Political History* (1980).91.

¹⁰⁴ "Hawaiian Constitution" (1864), Article 80.

¹⁰⁵ *Id.*

¹⁰⁶ "Penal Code of the Hawaiian Islands," *Hawaiian Kingdom* (1869), 8.

¹⁰⁷ *Id.*

¹⁰⁸ Lili‘uokalani, *Hawai‘i’s Story by Hawai‘i’s Queen* (1964), 181.

¹⁰⁹ Executive Documents, 760.

This so-called constitution has since been known as the *bayonet* constitution and was never submitted to the Legislative Assembly or to a popular vote of the people. It was drafted by a select group of twenty-one individuals¹¹⁰ that effectively placed control of the Legislature and Cabinet in the hands of individuals who held foreign allegiances. The constitution reinstated a bi-cameral legislature and an election of Nobles replaced appointments by the King. Property qualifications were reinstated for candidates of both Nobles and Representatives. And the cabinet could only be removed by the legislature on a question of want of confidence. The new property qualifications had the purpose of ensuring that Nobles remained in the hands of non-natives, which would serve as a controlling factor over the House of Representatives. Blount reported:

For the first time in the history of the country the number of nobles is made equal to the number of representatives. This furnished a veto power over the representatives of the popular vote to the nobles, who were selected by persons mostly holding foreign allegiance, and not subjects of the Kingdom. The election of a single representative by the foreign element gave to it the legislature.¹¹¹

So powerful was the native vote that resident aliens of American or European nationality were allowed to cast their vote in the election of the new legislature without renouncing their foreign citizenship and allegiance. Included in this group were the contract laborers from Portugal's Madeira and Azores Islands who emigrated to the kingdom after 1878 under labor contracts for the sugar plantations. League members owned these plantations. Despite the fact that very few, if any, of these workers could even read or write, league members utilized this large voting block specifically to neutralize the native vote. According to Blount:

These ignorant laborers were taken before the election from the cane fields in large numbers by the overseer before the proper officer to administer the oath and then carried to the polls and voted according to the will of the plantation manager. Why was this done? In the language of the Chief Justice Judd, "to balance the native vote with the Portuguese vote." This same purpose is admitted by all persons here. Again, large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote...¹¹²

Leading up to the elections that were to be held on September 12th, there was public outcry on the manner in which the constitution was obtained through the King and not through the Legislature as provided for by the 1864 constitution.¹¹³ On August 30, 1887, British Consul Wodehouse reported to the British Government the new Cabinet's response to these protests. He wrote, "The new Administration which was dictated by the "Honolulu Rifles" now 300 strong does not give universal satisfaction, and...Attorney General Ashford is reported to have said 'that they, the

¹¹⁰ In the William O. Smith Collection at the Hawaiian Archives there is a near finished version of the 1887 draft with the following endorsement on the back that read: "Persons chiefly engaged in drawing up the constitution were—L.A. Thurston, Jonathan Austin, S.B. Dole, W.A. Kinney, W.O. Smith, Cecil Brown, Rev. [W.B.] Oleson, N.B. Emerson, J.A. Kennedy, [John A.] McCandless, Geo. N. Wilcox, A.S. Wilcox, H. Waterhouse, F. Wundenburg, E.G. Hitchcock, W.E. Rowell, Dr. [S.G.] Tucker, C.W. Ashford." Added to this group of individuals were Chief Justice A.F. Judd and Associate Justice Edward Preston.

¹¹¹ Executive Documents, 579.

¹¹² *Id.*

¹¹³ Ralph S. Kuykendall, *The Hawaiian Kingdom: 1874-1893, The Kalakaua Dynasty* (1967), 407.

Administration, would carry the elections if necessary at the point of the bayonet.”¹¹⁴ The election “took place with the foreign population well armed and the troops hostile to the crown and people.”¹¹⁵ James Blount also concluded that foreign ships anchored in Honolulu harbor during this time “must have restrained the native mind or indeed any mind from a resort to physical force,” and the natives’ “means of resistance was naturally what was left of political power.”¹¹⁶

REVOLUTION AND THE RULE OF LAW

If it was a rebellion, or as Judd stated a “successful revolution,”¹¹⁷ what was the measurement of its success or its failure? According to Reid, “it is [international law] which defines the conditions under which a government should be recognized *de jure* or *de facto*, and it is a matter of judgment in each particular case whether a regime fulfills the conditions.”¹¹⁸ He continues to state that the “conditions under international law for the recognition of a new regime as the *de facto* government of a state are that the new regime has in fact effective control over most of the state’s territory and that this control seems likely to continue.” According to Beadle, there are two parts in the definition of *de facto* and *de jure* governments.

The first part requires that a regime should be “in effective control over the territory” and this requisite is common to both a *de facto* and a *de jure* Government. The second part of the definition deals with the likelihood of the regime continuing in “effective control.” If it “seems likely” so to continue, then it is a *de facto* Government. When, however, it is “firmly established,” it becomes a *de jure* Government.¹¹⁹

A successful revolution creates a *de facto* government, but the success of the revolution is measured by the maintenance of effective control and not merely the fact of effective control. In other words, success is time sensitive whereby the law breaker has been transformed into a law creator by virtue of effective permanency. This space of time is the revolution itself where the opposing forces between lawful and criminal are engaging, and determination of the victor is a pure question of fact and not law. In order to answer the second condition of “seems likely to continue” in the affirmative, Beadle states that the likelihood of

continuing in effective control of the territory depends on the likelihood of its being “overthrown,” and “overthrown” here means being *displaced*, and not merely being *replaced* by another Government elected in terms of the new revolutionary Constitution. It is the new Constitution which must be overthrown, not merely the persons who govern by virtue of it. This is so because a mere change of the personnel of the Government, if that change is effected in terms of the revolutionary Constitution, still leaves a revolutionary Government in control.¹²⁰

¹¹⁴ "Wodehouse to FO, no. 29, political and confidential," *BPRO*, PO 58/220 (Hawai'i Archives, August 30, 1887).

¹¹⁵ Executive Documents, 579.

¹¹⁶ *Id.*, 580.

¹¹⁷ *Id.*, 576. As a participant in the revolution, Chief Justice Judd cannot serve as a judge of his own crime. Article 10 of the 1864 constitution provides, “No person shall sit as a judge...in any case...which the said judge...may have...any pecuniary interest”—*nemo iudex in causa sua* (no one can be a judge in his own cause).

¹¹⁸ *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.*, 2 All ER 536 (1966).

¹¹⁹ *Judgment of the High Court of Rhodesia, Appellate Division*, 39 ILR 184 (1970).

¹²⁰ *Id.*, 225.

Kelson states that if “the revolutionaries fail, if the order they have tried to establish remains inefficacious, then on the other hand, their undertaking is interpreted, not as legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution.”¹²¹ According to Hackworth, a successful revolution must fulfill three factual conditions: (1) possess the machinery of the State; (2) operate with the assent of the people and without substantial resistance to its authority; and (3) fulfill international obligations.¹²² Olivecrona explains that the “victory of the revolution corresponds to the constitutional form in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is functioning again, more or less difference in regard to the aims and the means of those in power.”¹²³ Lloyd further expounds on the second condition of “assent of the people” and no “substantial resistance.” He states:

Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system, for without this there will be anarchy or confusion rather than a reign of legality. And where revolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate *de facto* power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity.”¹²⁴

From a municipal law standpoint, the terms *de jure* and *de facto* are not applied to revolution or civil war, but rather to offices in government. According to Cooley, an “officer *de jure* is one who not only is invested with the office, but who has been lawfully appointed or chosen, and therefore has a right to retain the office and receive its perquisites and emoluments. An officer *de facto* is defined to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.”¹²⁵ He further explains that a *de facto* officer “comes in by claim and color of right, or he exercises the office with such circumstances of acquiescence on the part of the public, as at least afford a strong presumption of right, but by reason of some defect in his title, or of some informality, omission or want of qualification, or by reason of the expiration of his term of service, he is unable to maintain his possession.”¹²⁶

A *de facto* officer is recognizable under municipal law, and according to Chief Justice Steere, the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were

¹²¹ Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (1945), 118.

¹²² Green Haywood Hackworth, *Digest of International Law*, Vol. I (1940), 175.

¹²³ Karl Olivecrona, *Law as Fact* (London: Stevens & Sons, 1971), 66.

¹²⁴ Dennis Lloyd, *The Idea of Law* (London: MacGibbon & Kee, Ltd., 1966), 162.

¹²⁵ Thomas Cooley, *A Treatise on the Law of Taxation* (1876), 185.

¹²⁶ *Id.*

concerned.”¹²⁷ If a person seizes office and is neither *de jure* or *de facto*, Cooley calls him a usurper or intruder, which he defined “as one who attempts to perform the duties of an office without authority of law, and without support of public acquiescence.” He adds that “no one is under an obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void.”¹²⁸ And “the party himself who had usurped a public office,” states Cooley, “is never allowed to build up rights, or to shield himself from responsibility on no better basis than his usurpation.”¹²⁹

Throughout the revolution, there was active opposition to the minority of revolutionaries by the Hawaiian citizenry that ranged from peaceful organized resistance to an unsuccessful armed attack against the usurpers. On November 22, 1888, the Hawaiian Political Association (Hui Kalai‘aina) was established with the purpose of the “restoration of the constitutional system existing before June 30, 1887.”¹³⁰ For the next five years this organization would be the most persistent and influential group opposing the small group of revolutionaries by maintaining that the constitution of 1864, as amended, was the legal constitution of the country. During this period, the Hawaiian Kingdom was in a state of revolution, whereby the insurgents could neither claim success *de facto* under international law nor as *de facto* officers under municipal law.

A Failed Attempt of Citizen’s Arrest

In June 1889, another organization was formed as a secret society called the Liberal Patriotic Association, whose purpose was “to restore the former system of government and the former rights of the king.”¹³¹ The following month on July 30th, the organization’s leader, Robert Wilcox, with eighty men, led an unsuccessful armed attack against the cabinet ministry on the grounds of ‘Iolani Palace. Wilcox was initially indicted for treason, “but it became clear that...no native jury would convict him of that crime. The treason charge was dropped and he was brought to trial on an indictment for conspiracy.”¹³² He was tried by a native jury, which found him not guilty. Their verdict represented the native sentiment throughout the kingdom, which comprised eighty five percent of the Hawaiian citizenry. In a dispatch to U.S. Secretary of State Blaine on November 4, 1889, U.S. Minister John Stevens from the American legation in Honolulu acknowledged the significance of the verdict. Stevens stated:

This preponderance of native opinion in favor of Wilcox, as expressed by the native jury, fairly represented the popular native sentiment throughout these islands in regard to his effort to overthrow the present ministry and to change the constitution of 1887, so as to restore to the King the power he possessed under the former constitution.¹³³

¹²⁷ *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

¹²⁸ Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, 7th ed. (1903), 898.

¹²⁹ *Auditors of Wayne Co. v. Benoit*, 20 Michigan 176 (1870).

¹³⁰ Kuykendall, *The Hawaiian Kingdom: 1874-1893*, 448.

¹³¹ *Id.*, 425.

¹³² *Id.*, 429.

¹³³ *Id.*, 298.

There is a strong argument that the actions taken by Wilcox and other members of the Liberal Patriotic Association fell under the law as an unsuccessful citizen's arrest, and not a counter-revolution as called by the cabinet ministry. In theory, a counter-revolution can only take place if the original revolution was successful. But if the original revolution was not successful, or in other words, the country was still in a state of revolution or unlawfulness, any actions taken to apprehend or to hold to account the original perpetrators is not a violation of the law, but rather law abiding. Under the common law, every private "person that is present when any felony is committed, is bound by the law to arrest the felon."¹³⁴ According to the Hawaiian Penal Code, the "terms felony and crime, are...synonymous, and mean such offenses as are punishable with death," which makes treason a felony. Therefore, Wilcox's attack should be considered a failed attempt to apprehend revolutionaries who were serving in the cabinet ministry. Wilcox reinforced the theory of citizen's arrest, himself, when he lashed out at Lorrin Thurston on the floor of the Legislative Assembly in 1890. Thurston, being one of the organizers of the 1887 revolution, was an insurgent and served at the time as the so-called Minister of the Interior. Wilcox argued:

Yes, Mr. Minister, with your heart ever full of venom for the people and country which nurtured you and your fathers, I say, you and such as you are the murderers. The murderers and the blood of the murdered should be placed where it belongs, with those who without warrant opened fire upon natives trying to secure a hearing of their grievances before their King. ...Our object was to restore a portion of the rights taken away by force of arms from the King. ... Before the Living God, I never felt this action of mine to be a rebellion against my mother land, her independence, and her rights, but (an act) for the support and strengthening of the rights of my beloved race, the rights of liberty, the rights of the Throne and the good of the beautiful flag of Hawai'i; and if I die as a result of this my deed, it is a death of which I will be most proud, and I have hope I will never lack the help of the Heavens until all the rights are returned which have been snatched by the self-serving migrants of America.¹³⁵

At the close of this tumultuous legislative session, where Hawaiian subjects were making their objections heard, the King's health had deteriorated, and he planned to travel to the city of San Francisco for a period of respite. On November 25th, he departed on board the U.S.S. Charleston and he designated Lili'uokalani, his heir apparent, as Regent during his absence.

Judicial Remedies Available

According to James Blount, "none of the legislation complained of would have been considered a cause for revolution in any one of the United States, but would have been used in the elections to expel the authors from power. The alleged corrupt action of the King could have been avoided by more careful legislation and would have been a complete remedy for the future."¹³⁶ Reinforcing Blount's observation that there were judicial remedies available to the ordinary citizen under Hawaiian law to hold account government officials, if they violated the law as alleged, was clearly pointed out by the Hawaiian Supreme Court in *Castle vs. Kapena, Minister of Finance*.¹³⁷ The plaintiffs in this case were W.R. Castle, Sanford B. Dole, and William O. Smith who were also the

¹³⁴ William Blackstone, *Commentaries of the Laws of England*, vol. 4 (1979), 289

¹³⁵ Robert Wilcox, "Speech before the Hawaiian Legislative Assembly," *Hawaiian Kingdom* (June 10, 1890).

¹³⁶ Executive Documents, 574.

¹³⁷ *Castle v. Kapena*, 5 Haw. 27 (1883).

leaders of the 1887 coup. These individuals sought to “enjoin the Minister [of Finance] from taking silver half-dollars for gold par bonds” by petitioning for a writ of mandamus. Although the court denied the writ on substantive grounds, it did maintain the remedy for tax-paying citizens to hold to account governmental officials at the seat of government. The proper remedy was mandamus or injunction, which could be applied for by tax paying citizens in any court of equity in the Kingdom, and, if the circumstances were warranted, private citizens could “bring it in the name of the Attorney-General, and permission to do so [by the court] is accorded as of course.”¹³⁸ The court also declared that:

the Constitution provides that the Ministers are responsible. It would be an intolerable doctrine in a constitutional monarchy, to extend the inviolability of the Sovereign to his Ministry; to claim that what is directed to be done by the King in Cabinet Council, and is done by any of his Ministers, is to be treated as the personal act of the Sovereign. Art. 42. “No act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible.”¹³⁹

The principle of necessity legitimizes a revolutionary act—otherwise a capital crime of treason—and renders lawful what would otherwise be unlawful. George Williams states that in order to legitimize a revolutionary act under the principle of necessity there “must be a transient and proportionate response to the crisis,” and the response “may be invoked only to uphold the rule of law and the existing legal order, and, therefore, cannot be applied to uphold the legality of a new revolutionary regime.”¹⁴⁰ Necessity cannot be applied in this case, because the revolutionaries sought to consolidate their power devoid of any rule of law or maintenance of the existing legal order in order to benefit a “little oligarchy, with a sham republican constitution.”¹⁴¹ Where a written constitution is the supreme law of the land, the doctrine of necessity calls for its temporary suspension and not its termination, for the necessity principle is designed to uphold the rule of law and the existing constitution, and not to abrogate it. Hawaiians had long understood this principle as evidenced in a resolution read before the 1864 constitutional convention by Delegates Parker and Gulick:

We do not deny that there may occur a crisis in a nation’s history, when Revolution is justifiable, when a Constitution may be violated, and a government resolved back into its constituent elements. But this doubtful and dangerous right is to be exercised only in those terrible emergencies, when the very existence of a nation is at stake, and when all Constitutional methods have been tried and found wanting.¹⁴²

THE HAWAIIAN CONSTITUTIONAL ORDER

Unlike Kamehameha V, Kalakaua, as the chief executive, did not have the constitutional authority to abrogate and then subsequently promulgate a new constitution without legislative approval. The constitution of 1864 no longer had the sovereign prerogative—Article 45, and, furthermore, the

¹³⁸ *Id.*, 34.

¹³⁹ *Id.*, 36.

¹⁴⁰ George Williams, “The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji,” *Oxford University Commonwealth Law Journal* 1 (2001): 73-93, 80.

¹⁴¹ Executive Documents, 760.

¹⁴² Mr. Parker: Mr. Gulick, “Resolution read before the Constitutional Convention,” *The Convention* (1864).

enactment of law, whether organic or statutory, resided solely with the Legislative Assembly together with the Crown. The 1864 Constitution, as amended, the Civil Code, Penal Code, and the Session laws of the Legislative Assemblies enacted before the 1887 revolution, comprised the legal order of the Hawaiian state. Article 78 of the 1864 Constitution provided that all “laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws heretofore enacted, or that may hereafter be enacted, which are contrary to this Constitution, shall be null and void.” For the next four years, the insurgents would struggle to maintain their control of the seat of government over the protests and opposition of Hawaiian subjects organized into political organizations. Notwithstanding the state of revolution, the legal order of the Hawaiian Kingdom remained intact and continued to serve as the basis of Hawaiian constitutional law.

Territory

On March 16, 1854, Robert Wyllie, Hawaiian Minister of Foreign Affairs, made the following announcement to the British, French and U.S. diplomats stationed in Honolulu.

I have the honor to make known to you that that the following islands, &c., are within the domain of the Hawaiian Crown, viz:

Hawai'i, containing about, 4,000 square miles;
Maui, 600 square miles;
O'ahu, 520 square miles;
Kaua'i, 520 square miles;
Molokai, 170 square miles;
Lana'i, 100 square miles;
Ni'ihau, 80 square miles;
Kaho'olawe, 60 square miles;
Nihoa, known as Bird Island,
Molokini)
Lehua) Islets, little more than barren rocks:
Ka'ula)
and all Reefs, Banks and Rocks contiguous to either of the above, or within the
compass of the whole.¹⁴³

Four additional Islands were annexed to the Hawaiian Kingdom under the doctrine of discovery since the above announcement. Laysan Island was annexed to the Hawaiian Kingdom by discovery of Captain John Paty on May 1, 1857.¹⁴⁴ Lisiansky Island also was annexed by discovery of Captain Paty on May 10, 1857.¹⁴⁵ Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on April 15, 1862, and proclaimed as Hawaiian Territory.¹⁴⁶ And Ocean Island, also called Kure atoll, was acquired September 20, 1886, by proclamation of Colonel J.H. Boyd.¹⁴⁷ Territorial jurisdiction extends “to the distance of one marine league (three miles), surrounding each of Our Islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau,

¹⁴³ A.P. Taylor, "Islands of the Hawaiian Domain" (Hawai'i Archives, January 10, 1931), 5.

¹⁴⁴ *Id.*, 7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, 8.

commencing at low water mark on each of the respective coasts, of said Islands, and includes all the channels passing between and dividing said Islands, from Island to Island."¹⁴⁸

The Islands that comprised the territory of the Hawaiian Kingdom on January 17, 1893 are located in the Pacific Ocean between 5° and 23° north latitude and 154° and 178° west longitude.

<u>Island:</u>	<u>Location:</u>	<u>Square Miles/Acreage:</u>
Hawai'i	19° 30' N 155° 30' W	4,028.2 / 2,578,048
Maui	20° 45' N 156° 20' W	727.3 / 465,472
O'ahu	21° 30' N 158° 00' W	597.1 / 382,144
Kaua'i	22° 03' N 159° 30' W	552.3 / 353,472
Molokai	21° 08' N 157° 00' W	260.0 / 166,400
Lana'i	20° 50' N 156° 55' W	140.6 / 89,984
Ni'ihau	21° 55' N 160° 10' W	69.5 / 44,480
Kaho'olawe	20° 33' N 156° 35' W	44.6 / 28,544
Nihoa	23° 06' N 161° 58' W	0.3 / 192
Molokini	20° 38' N 156° 30' W	0.04 / 25.6
Lehua	22° 01' N 160° 06' W	0.4 / 256
Ka'ula	21° 40' N 160° 32' W	0.2 / 128
Laysan	25° 50' N 171° 50' W	1.6 / 1,024
Lisiansky	26° 02' N 174° 00' W	0.6 / 384
Palmyra	05° 52' N 162° 05' W	4.6 / 2,944
Ocean (a.k.a. Kure atoll)	28° 25' N 178° 25' W	0.4 / 256

Citizenship

On January 21, 1868, Ferdinand Hutchison, Hawaiian Minister of the Interior, stated the criteria for Hawaiian nationality. He announced that "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." According to the law of naturalization, the Minister of the Interior:

shall have the power in person upon the application of any alien foreigner who shall have resided within the Kingdom for five years or more next preceding such application, stating his intention to become a permanent resident of the Kingdom, to administer the oath of allegiance to such foreigner, if satisfied that it will be for the good of the Kingdom, and that such foreigner owns without encumbrance taxable real estate within the Kingdom, and is not of immoral character, nor a refugee from justice of some other country, nor a deserting sailor, marine, soldier or officer.¹⁴⁹

The Monarch

The executive authority was vested in the Crown, who was advised by a Cabinet of Ministers and a Privy Council of State. The Crown exercised his executive powers upon the advice of his Cabinet and Privy Council of State, and no act of the Crown would have any effect unless countersigned

¹⁴⁸ March 16, 1854 Proclamation of Hawaiian Neutrality by His Majesty King Kamehameha III.

¹⁴⁹ Compiled Laws, 104.

by a Cabinet Minister, who made himself responsible. With the advice of the Privy Council, the Crown had the power to grant reprieves and pardons, after conviction, for all offences, except in cases of impeachment. The Crown was also represented by an appointed Governor on each of the main islands of Hawai'i, Maui, O'ahu, and Kaua'i. The Crown opens each new session of the Legislature by reading a Speech from the Throne, which sets out the vision of the government for the country and the policies and actions it plans to undertake. No law can be enacted without the signature of the Crown and countersigned by one of the Ministers of the Cabinet.

CABINET. The Cabinet consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom. The Cabinet is the Monarch's Special Advisers in the Executive affairs of the Kingdom, and are *ex officio* members of the Privy Council of State. The Ministers are appointed and commissioned by the Monarch, and hold office during the Monarch's pleasure, subject to impeachment. No act of the Monarch has any effect unless countersigned by a Minister, who by that signature makes himself responsible. Each member of the Cabinet keeps an office at the seat of Government, and is accountable for the conduct of his/her deputies and clerks. The Ministers also hold seats *ex officio*, as Nobles, in the Legislative Assembly. On the first day of the opening of the Legislative Assembly, the Minister of Finance presents the Financial Budget in the Hawaiian and English languages.

PRIVY COUNCIL OF STATE. The Monarch, by Royal Letters Patent, can appoint any of his subjects, who have attained the age of majority, a member of the Privy Council of State. Every member of the Privy Council of State, before entering upon the discharge of his/her duties as such, takes an oath to support the Constitution, to advise the Monarch honestly, and to observe strict secrecy in regard to matters coming to his/her knowledge as a Privy Counselor. The duty of every Privy Counselor is: to advise the Monarch according to the best of his knowledge and discretion; to advise for the Monarch's honor and the good of the public, without partiality through friendship, love, reward, fear or favor; and, finally, to avoid corruption—and to observe, keep, and do all that a good and true counselor ought to observe, keep, and do to his Sovereign.

Legislative Assembly

The Legislative Department of the Kingdom is composed of the Monarch, the Nobles, and the Representatives, each of whom has a negative on the other, and in whom is vested full power to make all manner of wholesome laws. They judge for the welfare of the nation, and for the necessary support and defense of good government, provided it is not repugnant or contrary to the Constitution. The Nobles sit together with the elected Representatives of the people in what is referred to as the House of the Legislative Assembly.

NOBLES. The Nobles sit together with the elected Representatives of the people and cannot exceed thirty in number. Nobles also have the sole power to try impeachments made by the Representatives. Nobles are appointed by the Monarch for a life term and serve without pay. A person eligible to be a Noble must be a Hawaiian subject or denizen, resided in the Kingdom for at least five years, and attained the age of twenty-one years. Nobles can introduce bills and serve on standing or special Committees established by the Legislative Assembly. Each Noble is entitled to one vote in the Legislative Assembly.

REPRESENTATIVES. The Representatives sit together with the appointed Nobles and cannot exceed forty in number. Each Representative is entitled to one vote in the Legislative Assembly. Representatives have the sole power to impeach any Cabinet Minister, officer in government or Judge, but the Nobles reserve the power to try and convict an impeached officer. A person eligible to be a Representative of the people must be a Hawaiian subject or denizen, at least twenty-five years, must know how to read and write, understand accounts, and have resided in the Kingdom for at least one year immediately preceding his election. The people elect representatives from twenty-five districts in the Kingdom. Elections occur biennially on even numbered years, and each elected Representative has a two-year term. Unlike the Nobles, Representatives are compensated for their term in office. Representation of the People is based upon the principle of equality and is regulated and apportioned by the Legislature according to the population, which is ascertained from time to time by the official census.

PRESIDENT OF THE LEGISLATIVE ASSEMBLY. The President is the Chair for conducting business in the House of the Legislative Assembly. He is elected by the members of the Legislative Assembly at the opening of the Session and appoints members to each of the select or standing committees. The President preserves order and decorum, speaks to points of order in preference to other members, and decides all questions of order subject to an appeal to the House by any two members.

The Judiciary

The judicial power of the Kingdom is vested in one Supreme Court and in such inferior courts as the Legislature may, from time to time, establish. The Supreme Court is the highest court in the land. It is the final court of appeal at the top of the Hawaiian Kingdom's judicial system. The Supreme Court considers civil, criminal and constitutional cases, but normally only after the cases have been heard in appropriate lower circuit, district or police courts. The Supreme Court consists of a Chief Justice and four (4) Associate Justices. All judges are appointed by the Monarch upon advice of the Privy Council of State. Any person can have their case heard by the Supreme Court, but first, permission or leave must be obtained from the court. Leave is granted for cases that involve a matter of public importance, or a law or fact concerning the Hawaiian Constitution. The Supreme Court sits for four terms a year on the first Mondays in the months of January, April, July and October. The Court may however hold special terms at other times, whenever it shall deem it essential to the promotion of justice. Decisions by the Court are decided by majority.

Rule of Law.

Hawaiian governance is based on respect for the Rule of Law. Hawaiian subjects rely on a society based on law and order and are assured that the law will be applied equally and impartially. Impartial courts depend on an independent judiciary. The independence of the judiciary means that Judges are free from outside influence, and notably from influence from the Crown. Initially, the first constitution of the country in 1840 provided that the Crown serve as Chief Justice of the Supreme Court, but this provision was ultimately removed by amendment in 1852 in order to provide separation between the executive and judicial branches. Article 65 of the 1864 Constitution of the country provides that only the Legislative Assembly, although appointed by the Crown, can remove Judges by impeachment. The Rule of Law precludes capricious acts on the

part of the Crown or by members of the government over the just rights of individuals guaranteed by a written constitution. According to Hawaiian Supreme Court Justice Alfred S. Hartwell:

The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null and void.¹⁵⁰

Separation of Powers

Although the constitution provided that the executive, legislative and judicial branches be distinct, they are nevertheless component agencies of a constitutional monarchy that exercises, together the “Supreme Power of the Kingdom.” Unlike the United States theory of separation of power where the branches of government are assumed independent of each other with “certain discretionary rights, privileges, prerogatives,”¹⁵¹ the Hawaiian theory views the branches as coordinate in function, but distinct in form. Hawaiian constitutional law provides the following interactions of the three powers in the administration of governance.

The King “shall never proclaim war without the consent of the Legislative Assembly,”¹⁵² the “King has the power to make Treaties,” but when treaties involve “changes in the Tariff or in any law of the Kingdom [it] shall be referred for approval to the Legislative Assembly;”¹⁵³ the King’s “Ministers are responsible,”¹⁵⁴ and “hold seats *ex officio*, as Nobles, in the Legislative Assembly;”¹⁵⁵ the “Legislative power of the Three Estates of this Kingdom is vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together;”¹⁵⁶ the Chief Justice of the Supreme Court “shall be *ex officio* President of the Nobles in all cases of impeachment, unless when impeached himself;”¹⁵⁷ and 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.”¹⁵⁸

¹⁵⁰ *In Re Gip Ah Chan*, 6 Haw. 25 (1870).

¹⁵¹ Charles Haines, "Ministerial Responsibility Versus the Separation of Powers," *The American Political Science Review* 16, no. 2 (1922): 194-210, 199.

¹⁵² 1864 HAWN. CONST., Article 26

¹⁵³ *Id.*, Article 29

¹⁵⁴ *Id.*, Article 31.

¹⁵⁵ *Id.*, Article 43.

¹⁵⁶ *Id.*, Article 45.

¹⁵⁷ *Id.*, Article 68.

¹⁵⁸ *Id.*, Article 70.