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Protecting Indigenous Identities: Struggles & Strategies Under International & Comparative Law

WHAT DOES IT MEAN TO “BUILD A NATION”? RE-IMAGINING INDIGENOUS POLITICAL IDENTITY IN AN ERA OF SELF-DETERMINATION

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I am so pleased and honored to be part of this Symposium on “Protecting Indigenous Identities: Struggles & Strategies Under International and Comparative Law.” I want to extend my deepest thanks and appreciation to Dean Aviam Soifer, Professor Mark Levin, Professor Jonathan Osorio and all of the members of the Asian-Pacific Law & Policy Journal for treating me so well and making my visit to Hawai‘i so enjoyable. I am inspired by the work that is taking place here, and I am very honored to be in the presence of the leaders who are here this evening, on the panel, and out in the audience. Thank you.

My topic this evening concerns the concept of “nationhood” for indigenous peoples. In particular, I would like to explore the notion of self-determination which, I think, is understood quite differently under domestic U.S. law than it is under contemporary international law. What is happening in Hawai‘i, including the controversy over the Akaka bill, exemplifies the tensions between domestic and international law. Hawai‘i is a vitally important site for the articulation of self-determination because of its unique history and

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because of the different political and cultural context of Native sovereignty within these islands, which have now been annexed into the United States. As I prepared these remarks, I thought of how I have felt each time I have stepped off the plane onto the soil of Hawai‘i. I always think to myself “this is not the United States!” It is a different land, and the people who belong to this land have a distinctive character, history and cultural identity from anything that I have seen in the United States. This feeling was particularly strong when I visited Hawai‘i a couple of years ago, as a Board member of the Native American Rights Fund, and was invited to witness several events held on January 17 in commemoration of Queen Lili‘uokalani’s courageous, but peaceful, resistance when the American insurgents proclaimed themselves the “Republic of Hawai‘i” and subsequently imprisoned her in ‘Iolani Palace.1 I was very moved by what I saw, heard, and experienced. I knew at that moment and still believe that the nation of Hawai‘i is here; it is present today. That is the reality of this place. That is the reality of the people who are here. Domestic law and policy may attempt to instruct us that there is a different “reality.” The Supreme Court in Rice v. Cayetano, for example, spoke about the “multicultural citizenship” of Hawai‘i as being the “reality.”2 Alternatively, the Akaka bill is designed to emulate the “domestic dependent nation” status of American Indian tribes and thereby offer a form of political identity to Native Hawaiian people as a group.3 This evening, I want to ask what it would mean to re-imagine the nation of Hawai‘i in this contemporary era? What possibilities exist within domestic law, within international law, within indigenous law, and how should we evaluate those possibilities?

1 I want to thank Ho‘oipo Pa, who was a fellow member of the Board at that time, for arranging this visit and including us in those events. I learned so much from her, as well as from Kunani Nihipali, Bumpy Kanahele, the Rev. Kaleo Patterson, and so many other Native leaders here in Hawai‘i who have generously shared their experiences, their culture, and their dreams of nationhood with me. The historical references that I consulted in preparation for this address included HELENA G. ALLEN, THE BETRAYAL OF LILI‘UOKALANI (1982) and LILI‘UOKALANI, Hawai‘i’s Story by Hawai‘i’s Queen (1898, republished 1964,1971).


I will start by offering some insights from “Federal Indian Law,” which is a body of domestic United States doctrine–inclusive of constitutional, statutory, and treaty law–that constructs the legal identity of the “domestic dependent nation.” That is an important conversation to have when considering what Native people can expect from the enactment of the Akaka Bill. Then I would like to talk about what protection international human rights law currently offers indigenous peoples, and what bearing this body of law has on the concept of indigenous nationhood. And finally, I will turn to examine “cultural sovereignty,” as a process of imagining nationhood and sovereignty from within the indigenous nation itself. That, of course, is the biggest challenge we have. These external frameworks are offered to indigenous people as the “reality.” We are told that indigenous nations within the United States are, by definition, “domestic dependent nations.” We are told that indigenous peoples have “human rights.” Is this the reality? Or is our “reality” within all of us, from way back in time? Cultural sovereignty is a much more difficult concept to articulate.

Let me start by posing some of the questions that I think are important for the Native Hawaiian people to ask as they start to re-imagine the Nation of Hawai‘i. There is a great deal of power in the words “To build a nation.” I imagine that it is precisely because of the power of those words that the Office of Hawaiian Affairs has used the phrase “KAU INOA: To Build a Nation” in its effort to register Native Hawaiians for the campaign to create a “Native Hawaiian governing entity.” Is a “Hawaiian governing entity” the same as a Nation? Is a “federally-recognized Indian tribe” the same as a Nation? What is our starting place to evaluate those questions? It seems to me that we must first ask “What is a Nation”? And I’m sure that there are many views out there about what a Nation is. We could go way back in time to the 19th century jurist Vattel, who claimed that the terms “nation” and “state” were co-extensive and referred to “a body of men, united together, to procure their mutual safety and advantage by means of their union.” Such societies freely determine their own political structures, and govern themselves under their own “authority and laws.” Every “nation that governs itself, under what form soever, without any dependence on a foreign power” constitutes

4 See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 102(1831) (J. Thompson, dissenting, quoting Vattel).
a "sovereign state." Importantly, sovereigns can bind themselves together in an alliance, acknowledging the need for military support from other sovereigns, without ceding their sovereignty. Today, international law instructs us that sovereign states have certain attributes: they possess a distinctive territory, they have a population, they have the power to engage in relations of war and peace, they govern themselves under their own laws. What was unclear in the nineteenth century and is still unclear is how indigenous peoples’ political status is perceived under these standards. United States’ domestic law describes American Indian nations and Alaska Natives as “domestic, dependent nations.” They are “nations” with rights of self-governance, but the emphasis is clearly on their “dependent” status. This “dependency” is what ensures that the federal government is the supreme sovereign, and that the Indian nations operate within the larger federal structure. Federal law also provides that tribes have a legal right to “self-determination,” created by statutes such as the Indian Self-Determination and Educational Assistance Act. Federal “self-determination” essentially entitles Indian tribes to contract with the federal government to directly administer federal programs for health, education, and welfare on the reservation. Theorists such as Stephen Cornell and Joseph Kalt, who put together Harvard’s Public Policy program dealing with Native Nations, have written at length about “nation-building” as an economic model. They advocate the necessity for tribes to develop healthy, functioning economies, weaning themselves from the damaging paternalism of federal “welfare” programs. They see self-governance and economic self-sufficiency as complementary and mutually supportive endeavors.

Compare these domestic accounts of self-determination with the principle of self-determination within international human rights law. There, the discussion is much different. Self-determination is a

5 Id. at 103.

6 Id. See also S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 14-15 (1996).


moral construct that implies political autonomy for a special category of groups that we call “peoples.” Only “peoples” have a right to self-determination. Other groups (e.g. ethnic groups or religious groups) do not. The concept of “peoples” has some overlap with that of “nations,” but is not co-extensive. By virtue of warfare and colonization, some “peoples” were unjustly incorporated into nations. These groups may have political rights to “self-determination” that need to be acknowledged. Today, there is an active debate over whether “indigenous peoples” are, in fact, “peoples” at all for purposes of the political right to self-determination. The specter of international destabilization cautions against according a political status to an indeterminate number of groups and so, there has not yet been agreement among the nation-states as to whether indigenous groups are “peoples.” There is further debate over which groups can claim status as “indigenous.” These are contested terms because the consequences of political recognition are significant, both for purposes of international law and for domestic law. With those caveats in mind, I will engage the three schools of thought that inform the issue of indigenous nationhood: the domestic model, the international human rights model, and the cultural sovereignty model.

I. THE DOMESTIC MODEL

When I start my course in federal Indian law, I ask my students to remember that the whole notion of a “domestic dependent nation” is a creation of Anglo-American jurisprudence. It is a fiction in the sense that it was used to “fit” Native nations into a European-derived political structure in order to accommodate the need of European peoples for acquisition of land and resources. The concept simply didn’t exist before Europeans had this need. It is important to acknowledge that Indian nations were not always “domestic dependent nations.” If, for example, you look at the early treaties between the United States and the Indian nations, such as the 1778 Treaty of Fort Pitt with the Delaware Nation, the U.S. solicited peace and friendship with the Indian nations as separate sovereigns. The Treaty requests permission from the Delaware Nation to enter and

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traverse Delaware lands.\textsuperscript{10} It solicits a military alliance so that the U.S. and Delaware Nation can combine forces to fight the British.\textsuperscript{11} The United States guarantees Delaware “all of their territorial rights in the fullest and most ample manner” so long as they hold fast to the “chain of friendship” that they have entered into in the Treaty.\textsuperscript{12} This type of treaty reflects an understanding that the Indian nations were international sovereigns and not “domestic dependent nations.” So how did we get from the international sovereignty model to what we have today?

Many of you are probably familiar with the “Marshall trilogy” of Supreme Court cases from the nineteenth century that defined the basis for treating Indian nations as “domestic dependent nations.”\textsuperscript{13} Johnson v. M’Intosh was the first case in the trilogy, and Chief Justice John Marshall held that the Europeans took paramount title to lands in the “new world” upon “discovery” and subsequent settlement of the lands.\textsuperscript{14} The Native peoples merely retained a right of “occupancy,” which was not equivalent to the type of property interest that civilized European nations held to their territories and lands. In the United States, the “aboriginal title” right of Indian nations is a right of physical use and occupancy until the United States extinguishes that title “by purchase or conquest.”\textsuperscript{15} The interest does not enjoy protection under the Fifth Amendment of the Constitution because it is not considered to be a true property interest until the ownership is formally acknowledged by the government through treaty, statute or executive order.\textsuperscript{16} Nonetheless, through the Indian Claims

\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Id.


\textsuperscript{14} 21 U.S. (8 Wheat.) 543 (1823).


\textsuperscript{16} See Tee Hit Ton Indians v. United States, 348 U.S. 272 (1955) (finding that “Indian occupation of land without government recognition of ownership
Commission Act, Congress has provided a statutory mechanism to compensate Indian nations for the loss of aboriginal title, while also providing a legal mechanism to extinguish any lingering claims based on aboriginal use and occupancy.17

The second part of the Marshall trilogy dealt with the state of Georgia’s attempt to exercise jurisdiction within the boundaries of the Cherokee Nation’s territory and prevent the Cherokee Nation from enforcing its own laws and exercising its own rights of self-government.18 The Cherokee Nation initially attempted to sue the state of Georgia and enjoin it from enforcing its laws against the Cherokee Nation and within Cherokee territory.19 In Cherokee Nation v. Georgia, a majority of the Court held that the Cherokee Nation did not have jurisdiction to bring the claim because it did not constitute a “foreign nation” for purposes of jurisdiction under Article III of the Constitution.20 The two dissenting judges felt that the Cherokee Nation possessed the attributes of a “foreign nation” and should be considered as such for purposes of Article III.21 However, Marshall’s opinion found that the Indian tribes held a unique status as “domestic dependent nations,” because, while they were separate nations, they were so completely under the “sovereignty and dominion of the United States” that they were considered by foreign sovereigns to be incorporated into the polity of the United States. They had been divested of their power to alienate their lands to any sovereign other than the United States, or to engage in an alliance with a foreign nation in contravention of the interests of the United States. In the second opinion, Worcester v. Georgia, Marshall further explicated the nature of a “domestic dependent nation.”22 Indian tribes were considered to be territorial sovereigns “under the

creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law”).


19 Id.

20 Id.

21 U.S. CONST. art. III.

protection of the United States.” This meant that the states could not apply their laws within the Cherokee Nation except with the permission of the United States. Rather, “the whole intercourse between the United States and [the Indian nations], is, by our constitution and laws, vested in the government of the United States.”

At the time the Marshall trilogy was authored, there was still considerable confusion about the political status of the Indian nations. The Cherokee Nation was a particularly compelling example of Native sovereignty, because it possessed a governmental structure that resembled that of the Europeans (with executive, legislative, and judicial functions) and had all of the cultural attributes of “civilization” (a written language, formal laws and codes, a court system with published opinions, an agricultural economy). However, throughout the 19th century, the “domestic dependent nation” model developed more in accordance with the “dependency” aspect of the relationship than with the idea of “nationhood.” Federal Indian law developed two important features: first, the idea that Congress possesses “plenary power” to regulate Indian tribes; and second, the idea that this Congressional power is modified by the “trust responsibility” of the federal government to act in the best interests of its Indian “wards.”

What is “plenary power”? The doctrine, as it has developed within federal Indian law, is largely “extra-constitutional” and based on the federal government’s unique political role with respect to the Indian nations. The justification for this type of power, which at various times in history has been considered pervasive and virtually unlimited, is the “dependency” of the Indian tribes. Congress has the power to enact laws on behalf of the Indian tribes on the basis of their dependency; however, this power is supposedly qualified by the constraints of its “trust responsibility.”

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23 Id. at 520.


25 See United States v. Kagama, 118 U.S. 375 (1886) (finding that from the “weakness and helplessness” of the Indians, “there arises the duty of protection, and with it the power”).

26 See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding political authority of Congress to allot a reservation in violation of the Treaty with the tribes
responsibility has not been effective to constrain Congressional action that harms tribal interests. In fact, statutes such as the Dawes Allotment Act and Termination Acts, which were very harmful to the tribes, are considered to be acceptable exercises of congressional plenary power. So, with respect to congressional power, the trust responsibility is largely considered to be a “moral” duty and is not legally enforceable. Moreover, the most recent jurisprudence from the Supreme Court dealing with federal mismanagement of trust assets has imposed a very rigorous standard which largely precludes damages unless it is clear that the federal government had a legally enforceable duty and exclusive authority to manage trust assets, along the lines of a common law trustee, and acted in egregious disregard of its duty to the clear detriment of the Indian tribe.

Today, there is widespread agreement that the tribes, as domestic dependent nations, have a “quasi-sovereign” status. What does that entail? On a structural level, it means that Congress can constitutionally pass special legislation on behalf of the tribes, because they have a group status that is “political” and not purely “racial.” It means that the Bureau of Indian Affairs (BIA) and the

27 Under the authority of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), Congress enacted various statutes dividing specific reservations into homesteads, which were granted to individual tribal members and, often, selling the remainder of the reservation to non-Indians as “surplus lands.” Many tribal members lost their lands as a result of allotment. The policy was formally rescinded in 1934, with the passage of the Indian Reorganization Act. However, the consequences of allotment, such as fractionated heirship interests in land, continue to plague tribal governments. Another harmful policy was authorized by House Concurrent Resolution 108 in 1953, which authorized Congress to enact statutes terminating the federal trust relationship with particular tribes. The intent of the legislation was to sell reservation lands and resources, divide the proceeds among tribal members, and encourage them to move to urban areas to assimilate as “equal citizens.” The tribes subjected to termination were devastated by this policy. Ultimately, the policy was rescinded and many tribes successfully petitioned to have their trust status restored.


Indian Health Service (IHS) administratively respond to the health, safety, and welfare interests of the tribes. It means that the tribes have the ability to appeal to the federal government to administer their programs under federal law, and that they should generally be accorded this right in the interests of enhancing tribal “self-governance.” This does not, of course, guarantee sufficient funds to the tribes or the federal agencies charged with protecting tribal interests. Rather representatives of the tribes, BIA and IHS must lobby Congress each year for sufficient appropriations to carry out all of these functions. There is a tremendous unmet need in Indian Country to develop sufficient infrastructure for tribal self-governance, including roads, utilities, buildings, schools, court systems, and law enforcement services.

On the plus side of their “quasi-sovereign” status, tribes enjoy a special relationship with the federal government and the ability to have a tribal council to pass laws and tribal courts to enforce those laws on the reservation. On the minus side of the equation, however, nobody is quite sure what the content of tribal sovereignty is. There is widespread agreement that tribes have the right to govern themselves, meaning their own members and their trust lands. On the other hand, there is widespread disagreement as to whether they can exercise jurisdiction over non-members or over lands that are not held in tribal ownership. In Alaska v. Native Village of Venetie, for example, the Supreme Court held that the Native Alaskan villages were not “Indian Country” for purposes of tribal authority to tax because of the corporate structure of the tribal governments and nature of Native land ownership under the Alaska Native Claims Settlement Act, which is largely in fee and not in trust. The Court even stated that there was not a sufficient “dependency” upon the federal government to justify tribal taxation power over these lands! In addition, the Supreme Court has developed a doctrine within federal Indian law that holds that tribes have diminished sovereignty because they were incorporated into the United States as dependents. This means that the tribes may not exercise sovereignty in a way that would impair the “overriding interests of the federal


31 Id.

32 Id.
government. In Oliphant v. Suquamish Tribe, for example, the Supreme Court held that the tribes had been implicitly divested of criminal jurisdiction over non-Indians because the federal government would not intend for non-Indian citizens to be adjudicated by governments that are not bound by the Constitution and Bill of Rights and might treat these defendants unfairly or impair their liberty interests. The Court did not consider the analogous protections of the Indian Civil Rights Act of 1978 to be sufficient protection for non-Indian interests.

So, what is the future of the tribal sovereignty doctrine within federal Indian law? A recent case from the Supreme Court, United States v. Lara, foreshadows the Supreme Court’s future work in the area of tribal sovereignty. The Lara case dealt with the legality of a federal statute, enacted several years earlier, which was designed to cure the “jurisdictional void” caused by the Supreme Court’s extension of the Oliphant doctrine in Duro v. Reina to nonmember Indians on the reservation. Unlike the situation with non-Indians, the federal government had never taken jurisdiction over misdemeanors committed by Indians against other Indians in Indian Country. Therefore, when the Supreme Court held that tribes had been implicitly divested of criminal jurisdiction over all nonmembers—Indians and non-Indians—this meant that these defendants could not be prosecuted by any government, because states generally lack criminal jurisdiction on the reservation. Congress issued a statutory “fix” by enacting an amendment to the Indian Civil Rights Act which confirmed that Indian tribes retain the inherent sovereignty to exercise criminal jurisdiction over all Indians, including non-members.

In United States v. Lara, a non-member Indian challenged a federal prosecution that took place after his tribal prosecution for assault on a police officer, claiming that the federal prosecution was barred by the double jeopardy clause. If tribal sovereignty to

33 Id.


prosecute nonmember Indians was delegated by the federal government in the “Duro-fix” legislation, then that would be an appropriate defense. However, if, as Congress stated, the tribe was exercising its inherent sovereignty, then concurrent tribal-federal prosecutions are constitutionally permissible under the “dual sovereignty” doctrine. The majority opinion in Lara upheld the federal prosecution because Congress had clearly stated that the tribe’s power to prosecute Indians stems from its inherent sovereignty and thus, it has a different source of power than the federal prosecution. Justice Breyer’s opinion reasons that, under the plenary power doctrine, Congress can limit, modify or extinguish tribal sovereignty. Therefore, it makes sense that Congress can also restore tribal sovereignty. In support of this position, Breyer points to cases where tribes have had their federal status terminated and then restored. The majority opinion specifically does not address whether the defendant’s constitutional rights were abridged in the tribal court proceeding because that issue was not raised in the tribal court action. Thus, the equal protection and due process challenges to the Duro-fix were reserved for another day.

The template for the Court’s future opinions is shaped by the separate concurring and dissenting opinions, which highlight the Court’s growing discomfort with tribal sovereignty. Justice Stevens’ concurring opinion notes that, prior to European colonization, tribes were truly “independent” sovereigns and enjoyed a level of sovereignty much greater than that of the states. He reasons that if Congress has the power to restore certain aspects of state sovereignty, it should certainly have this authority with respect to the Indian tribes. Justice Kennedy’s concurring opinion, however, posits that the majority opinion may have gone too far because it validates the constitutional authority of Congress to relax restrictions on inherent sovereignty in a way that extends tribal sovereignty beyond its historic boundaries. He concurred only because the constitutional challenges were not raised at the tribal court level. Justice Kennedy clearly questions, however, whether Congress has the power to force a citizen of the United States to submit to the criminal jurisdiction of a

38 Lara, 541 U.S. at 200.

39 Id. at 210-211.

40 Id. at 212.
government that is not constitutionally limited in its powers.\textsuperscript{41} He distinguishes the situation of tribal members, claiming that these citizens have given consent to tribal jurisdiction by accepting the benefits of membership.\textsuperscript{42}

Justice Thomas’s concurring opinion is important because he clearly points out that the premises and logic of the Supreme Court’s tribal sovereignty cases are confusing and disjointed, raising “two largely incompatible and doubtful assumptions.”\textsuperscript{43} First, the cases assume that Congress has complete authority to regulate “virtually every aspect of the tribes without rendering tribal sovereignty a nullity.”\textsuperscript{44} And second, the cases assume that Indian tribes retain “inherent sovereignty to enforce their criminal laws against their own members.”\textsuperscript{45} Because the Supreme Court has to date accepted the validity of both assumptions, Thomas concurs in the result. However, he believes that the Supreme Court must soon address the issue of whether the tribes are or are not separate sovereigns. If Congress has the plenary power to limit or eliminate tribal sovereignty altogether, Thomas indicates in his lengthy and complex separate opinion, then the tribes really are not “sovereign” at all.\textsuperscript{46} Justices Souter and Scalia dissented from the majority opinion on the basis that “tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore not inherent.”\textsuperscript{47} Therefore, in enacting the statute, Congress had merely delegated its own federal lawmaking power to the tribes, which were more akin to federal “administrative agencies” than states. The dissenting justices claimed that there were only two ways to “restore” tribal inherent sovereignty. First, Congress could “grant the same independence to the tribes that it did to the Philippines.”\textsuperscript{48} Or second, the Supreme

\begin{itemize}
\item \textsuperscript{41} Id. at 212.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 215.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 225.
\item \textsuperscript{47} Id. at 227.
\item \textsuperscript{48} Id. at 229.
\end{itemize}
Court could “repudiate its existing doctrine of dependent sovereignty.” The dissenting opinion sets up a tension between Congress and the Supreme Court as to which branch has the power to decide the future of tribal sovereignty, and further indicates that the “domestic dependent nation” model is NOT a repository of “true” sovereignty.

Professor Robert A. Williams, author of the book, *Like a loaded weapon: the Rehnquist court, Indian rights, and the legal history of racism in America* has talked about the diminished sovereignty line of cases as the “death of Federal Indian law.” According to Professor Williams, Chief Justice Marshall’s conception of sovereignty does not even exist anymore. Professor Williams, along with Professor S. James Anaya, have advocated for indigenous groups to enter the international human rights process rather than depending upon the domestic governments to honor their historic bargain with the Indian Nations. In fact, international human rights law is currently a focal point for indigenous peoples throughout the world who are seeking recognition of their rights to sovereignty and self-determination. With that in mind, let’s turn to examine the possibilities for indigenous nationhood raised by the international human rights model.

II. THE INTERNATIONAL HUMAN RIGHTS MODEL

International human rights law is a relatively recent body of law, stemming from developments in the post-World War II era. However, it is part of the much older natural rights tradition which posits that all human beings enjoy a fundamental set of rights. The international human rights model is also associated with the idea of civil rights, leading some countries, such as the United States, to claim that international human rights are largely duplicative of the constitutional and statutory civil rights already present under domestic law. Because of its status as a Constitutional democracy, the U.S. generally declines to sign onto the binding human rights protocols or enforcement structures which might be appropriate for governmental regimes that do not employ the same structural protections to guarantee the civil rights of their citizens.

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49 Id.

It is important to realize that international human rights law is a sub-category of international law. International law remains centered around the nation-states and protects the stability of this global structure.\(^{51}\) So, while indigenous peoples are attempting to carve out a space within the larger global structure by employing constructs of international human rights, they are still excluded from the brotherhood of nations that characterizes international law. International human rights law, however, is increasingly perceived as a vehicle to achieve justice for indigenous groups, including redress for past wrongs committed in the process of colonialism, and efforts to correct present unfair treatment. In that sense, it is interesting to explore in detail two of the primary mechanisms to achieve political justice, as they are explicated by Article 1 and Article 27 of the International Covenant on Civil and Political Rights.\(^{52}\) Article 1 proclaims that “all peoples have the right of self-determination,” and by virtue of this right, they are entitled to govern themselves freely. Article 27 of the same instrument covers minority, ethnic, and religious groups in the exercise of discrete rights which are primarily cultural, e.g. the ability to freely practice their religions and speak their languages. The primary question within international human rights law is whether indigenous peoples are “peoples” for purposes of Article 1, or whether “self-determination” means something different for indigenous peoples. The United Nations Draft Declaration on the rights of indigenous peoples, which is in a very preliminary stage but might ultimately lead to a convention on the subject, says indigenous peoples have a right of self-determination.\(^{53}\) However, the nation-states are reluctant to agree that indigenous peoples fit within the guarantee of Article 1. That is the big question right now. It is quite ironic that, in the sixteenth century, Europeans met in the Council of Indies to decide whether or not Indians were “people” (e.g. “human beings”) and therefore, whether the lands they

\(^{51}\) See Anaya, supra note 7 at 39.


occupied could be considered “vacant” for purposes of colonization.\textsuperscript{54} And today, there is a whole discussion about whether indigenous groups are “peoples.” So, the discussion has shifted a bit, but the same western ideology governs the question of political status and rights vis-à-vis other nations.

When indigenous peoples make a claim under international human rights law for separate political status, what is the content of that claim? Scholars have suggested that there are various conceptual structures within international law to address indigenous peoples’ claims. First, indigenous peoples’ claims could be advocated as “non-discrimination” claims. Under this category, human rights are basically civil rights. Each individual is entitled to the same uniform level of civil rights. If domestic laws violate these rights, then the international human rights arena is available to petitioners seeking equal access to the domestic political system and recognition of their basic and fundamental human rights. The question that arises from this discussion is whether the individual rights model is supportive of the notion of indigenous nationhood. I would assert that it is not. It basically is a citizenship model that says to nation-states that they ought not to discriminate against groups of people within the larger society. In the United States, the “citizenship model” does very little to assist Native Nations. A good example is found with the First Amendment claim to religious freedom. When Native people used the first amendment to try to prevent a government road project through their sacred lands, the Supreme Court said it was not a problem of religious freedom at all! In the \textit{Lyng} case, O’Connor held that the government could do whatever it wanted on its own public land, so long as it was not trying to coerce individuals into violating their religious beliefs and did not intend to select a particular religious activity for punishment.\textsuperscript{55} Because the Native people were free to believe whatever they wanted and the government’s road project was a purely administrative use of government property, the Native people could not complain that the government was intruding on their First Amendment rights.\textsuperscript{56} In the United States, the equal citizenship

\begin{itemize}
\item \textsuperscript{54} See SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES 6-7 (1998).
\item \textsuperscript{55} \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}, 485 U.S. 439 (1988).
\item \textsuperscript{56} \textit{Id}.
\end{itemize}
claim is most often raised by non-Indians who are protesting the “special rights” that Indians enjoy (e.g. the right to engage in gaming on tribal lands) or the ability of tribes to exercise jurisdiction over non-members, which is perceived to violate the “civil rights” of the non-members. In short, anti-discrimination claims are pervasive, but most often used against tribal interests.

The second conceptual category within which to address indigenous peoples’ claims is that of “minority rights.” The overwhelming tendency of international human rights scholars is to consider indigenous peoples’ claims as similar to those of national minorities residing within particular nation-states. While similar, the two categories of claims are clearly not co-extensive. In fact, Canada’s Constitution Act distinguishes minority rights, such as those belonging to the French-speaking population of Quebec, from Native rights, acknowledging that each has a different origin and method of recognition under that country’s domestic law. However, many international law scholars see the two categories as analogous, claiming that what indigenous peoples really want is the right to preserve and protect their discrete cultures and group identity, and that they are not generally seeking independent nationhood outside of the domestic structure. This impression is bolstered by the cases that have come out of the U.N. Committee on Human Rights that was formed under the International Covenant of Civil and Political Rights for those countries that sign on to the Optional Protocol. Indigenous peoples’ cases are generally handled under Article 27 on cultural rights and not under Article 1 on self-determination rights. In fact, that very issue was raised in Kitok v. Sweden, dealing with the Swedish government’s right to regulate reindeer herding by the Sami people in a way that disadvantaged certain Sami individuals who had removed themselves from the traditional subsistence lifeways of the community.57 The Committee held that Kitok did not have standing to bring an Article 1 claim for infringement of the Samis’ right to self-determination because that claim was only available to “peoples.” He did have standing to bring an Article 27 claim, but the Committee

found that the government had not acted illegally in restricting reindeer herding to only those Sami who continued to depend on this for their livelihood. In evaluating the propriety of the government action, the U.N. Committee used a balancing test that examines whether the nation-state is acting in the best interests of the indigenous group, which is a relatively paternalistic theory and is certainly not reflective of sovereignty or self-determination.\(^\text{58}\)

The third category is that of self-determination claims. Although self-determination is the most relevant concept, it is also the least understood. There are many different accounts of self-determination, but for purposes of this talk, I will compare two scholarly accounts that evaluate the central issue, which is “what groups are entitled to raise a claim of self-determination”? According to Professor S. James Anaya, there are basically three views on this.\(^\text{59}\) The most narrow view is that self-determination applies only to the populations of territories that are operating under the conditions of classical colonialism.\(^\text{60}\) That is a very limited category of groups. The second view would expand the term “peoples” to include aggregate constellations of independent states.\(^\text{61}\) Thus, rights of self-determination would accrue to the entire population of a given territory, but not to subgroups within the territory, thus requiring another category of rights for cultural groups under Article 27.\(^\text{62}\) The third and most expansive view is that the world is divided into mutually exclusive territorial communities, defined by perceived spheres of ethnographic cohesion and historically exercised territorial sovereignty.\(^\text{63}\) Rights of self-determination attach accordingly. Although this is the most expansive view, it is quite ambiguous, making it virtually impossible to make meaningful distinctions in many cases.

\(^{58}\) See id. (“a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole”).

\(^{59}\) ANAYA, supra note 7, at 77-78.

\(^{60}\) Id. at 77.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id. at 78.
Anaya claims that each of these accounts is incomplete because they ignore the reality that “there are multiple overlapping spheres of community, authority and interdependency that exist in human experience.” Anaya is not a strong proponent of indigenous “sovereignty” or independence, believing that these terms do not reflect what indigenous peoples are really seeking, which is a relationship with the nation-state that will allow them to have access and a separate political status that respects their group rights to land, natural resources, and cultural resources. He thinks that few, if any, indigenous peoples would seek to secede from the nation-state, which is, of course, one of the remedies for violation of the right to self-determination.

Compare Professor Anaya’s account with that of Professor Fernando Teson, who takes the view that self-determination is a “majoritarian entitlement held by members of a group residing in a territory to determine its political status and organization in order to redress political or territorial injustices.” All of this must occur, however, within a framework of respect for the individual civil rights of other people. So, for example, if the Navajo Nation wanted to assert its right of self-determination, Teson would require an assessment of the impact of this on citizens of Arizona and New Mexico. Teson worries about the impact of self-determination on “innocent third parties,” which might occur, for example, by according a level of political power to a group that could be used to suppress individual rights. Teson also questions the potential destabilization that could occur from allowing groups to secede from the nation-states. Teson would recognize a right to secede only in cases of extreme injustice and only where other, democratic remedies are unavailable. Thus, it seems unlikely that Teson would recognize a right of self-determination for Native groups in democracies such as the U.S. and Canada.

64 Id.

65 Id. at 79-80.

66 Id. at 84-85.

The final category is based on the notion that indigenous claims are unique and have a distinctive “sui generis” status. Indigenous peoples’ claims possess two distinctive characteristics: an assertion of historic sovereignty and the notion that “indigenous” status reflects a unique connection to land that is not present for any other group. The argument for sui generis rights proceeds along the following lines. First of all, indigenous peoples were organized as governments prior to colonization, and therefore they have “historic sovereignty.” Secondly, indigenous peoples were wrongfully divested of that sovereignty by racist notions of who was entitled to be a “sovereign,” namely the European nations and not the indigenous nations. Thus, indigenous sovereignty was not recognized because of European racism. Finally, indigenous peoples have an important connection to their ancestral territories because they are the original occupants, or at least the prior occupants, when compared to the Europeans.

The historic sovereignty argument is compelling and the treaty relationships that were formed in the United States, Canada, and New Zealand lend support to the account. However, several scholars have attacked this argument along the following lines. First of all, they claim that the historic sovereignty argument is inconsistent with international law doctrines maintaining that because of the passage of time and the principle of non-interference in the domestic affairs of nations, it would be unfair to destabilize existing political regimes to accord status to indigenous peoples as nations. Secondly, there is a debate about whether the term “indigenous” should be used to identify a particular class of groups for purposes of privileging their rights claims. Legal philosopher Jeremy Waldron has written an extensive critique about the use of “indigeneity” as a method to assess rights.68 The primary subject of his attack is indigenous land rights. While most aboriginal title claims in the United States have already been litigated, other countries, such as Canada, New Zealand, and Australia are just now dealing with these claims. Therefore, the critique of indigenous land rights is particularly compelling for the development of jurisprudence in these countries.

Waldron initially asks whether the concept of “indigeneity” does any work in claiming rights to land on the basis of prior or original occupancy. Waldron concludes that it does not, and further

observes that the term “indigenous” is used by Native peoples in a “self-serving” manner to transform the “multicultural” reality of contemporary society into a “bicultural” Native/non-Native model. Waldron claims that this is completely illegitimate, and that there is no “moral force” in either the claim to original occupancy or prior occupancy. According to Waldron, the argument based on “original occupancy” fails because the Native peoples generally cannot prove with scientific certainty that they were “first” in time. In fact, there is evidence that many people agree with Waldron. For example, there is an intensive scientific quest underway to identify the “first Americans.” The controversy over Kennewick Man, the ancient skeleton in Washington, is part of this effort. And, as you may know, the Ninth circuit has held that this ancient skeleton cannot be considered “Native American” for purposes of the Native American Graves Protection and Repatriation Act because he cannot be genetically or culturally linked to an identifiable contemporary group of Native people.69

Waldron continues his argument by observing that if one indigenous nation dispossessed another to gain occupancy, that land claim is founded on “war and violence” and similarly lacks “moral force.” Waldron further asserts that the prior occupancy argument is problematic, not in terms of “proof” because it is obvious that the Native peoples were here when the Europeans arrived, but because of the long passage of time. According to Waldron, honoring Native land claims today would disrupt the “expectation interests” of the people who live on these lands now and would cause “inequities” in contemporary society. Given these arguments, it is unclear that a category of “indigenous rights” will do the work necessary to justify indigenous claims to “nationhood.”

III. THE CULTURAL SOVEREIGNTY MODEL

In our article on cultural sovereignty, Wallace Coffey and I noted the limitations of the tribal sovereignty doctrine as it has been applied to American Indian nations.70 We called for a “reappraisal of

69 Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004).

the tribal sovereignty doctrine— one that is based in the conceptions of sovereignty held by Indian nations and which responds to the challenges that confront Indian nations today.” Cultural sovereignty, then, is the effort of Native peoples and Native nations to exercise their own norms and values in structuring their collective future. Native sovereignty must be defined from “within.”

So, what can indigenous people do to reclaim their own norms, values, and epistemologies, and how can this discussion start from “within” the group, rather than being defined externally by all of these other structures and entities? I believe that the Native Hawaiian people are engaged in that process right here, as they continue a spirited dialogue about what it means to be part of the indigenous people that belong to Hawai’i, what it means to be part of a historical government—the Kingdom of Hawai’i—that was an internationally recognized nation. What was the legal order here, and how might we re-imagine that today? I will conclude this presentation by raising some questions with respect to the situation here in Hawai’i.

What is the future of the Nation of Hawai’i? I think that there are a number of possibilities. I read the transcripts of the conference that was sponsored here on the Akaka Bill, and the respondents in that conference raised a number of interesting ideas. The most interesting, to me, was the idea of whether or not the Nation of Hawai’i can be recognized again as a full and independent sovereign. I think that there is a very compelling argument for this because the doctrine of discovery that was applied to the Indian nations was never applied to the Hawaiian people. Rather, the Kingdom of Hawai’i had international recognition as an independent sovereign, and the United States accorded the Kingdom of Hawai’i full diplomatic recognition. Unlike the Indian treaties, the treaties of peace and friendship with the Kingdom of Hawai’i did NOT place the Kingdom under the “sole and exclusive protection” of the United States. These facts completely distinguish the historical position of the Kingdom of Hawai’i from that of the American Indian nations as a matter of international and domestic law. The question on the table today is whether the contemporary experience of the Hawaiian people can be linked to that of American Indian and Alaska Native peoples through a common

71 Id. at 195.

72 Id. at 196.
identity as “indigenous people” in the United States which would arguably justify (for purposes of domestic law) a different relationship, e.g. the plenary power/trust doctrines that apply to “domestic dependent nations.” Let me first highlight the problem with imposing this model on the Native Hawaiian people. First, the monarchy structure is not a tribal structure. So, the Native Hawaiian people themselves clearly adopted a political form that was consistent with that of many European nations and was vastly different from that of most American Indian nations. What will the contemporary form of political government be for the Native Hawaiian people? I take it that there is a huge debate over how to define the “Native Hawaiian governing entity” and that should not be a surprise given the historical facts. A second and related problem is that the Kingdom of Hawai‘i maintained citizenship policies that did not restrict citizenship to only “indigenous” peoples. So, the citizenship of the Kingdom of Hawai‘i, while predominantly Native, was not exclusively Native. What happens to the descendants of those citizens? And what role will “blood quantum” play in defining who is a “Native Hawaiian”? Finally, the Kingdom of Hawai‘i maintained a very complex and ordered system of land titles. This is quite different than American Indian claims to “aboriginal title.” In Hawai‘i, one civilized nation forcibly annexed another civilized nation with recorded land titles. Under Chief Justice Marshall’s own assessment, international law mandates recognition of preexisting land titles by the conquering nation. So, the Kingdom of Hawai‘i did not have any of the attributes of a “domestic dependent nation.” It fit squarely within the model of the “civilized nations” that Marshall would have prescribed different rules for. And today, that lends a great deal of support for the idea of re-imagining that Nation as an independent sovereign.

The second idea that was present in the transcripts was the idea that the Native Hawaiian people could form a nation with a protectorate relationship with the United States. The Nation would be moving toward full independence, but would contractually agree to a structured relationship with the United States while it was on the path to independence. This model is present, for example, in the free association compact between the United States and Palau, which was

73 See Johnson v. M’Intosh, 21 U.S. at 589 (noting that when one civilized nation conquers another, “the conquered [people] shall not be wantonly oppressed,” but rather the citizens should be incorporated within the new nation and “the rights of the conquered to property should remain unimpaired”).
approved by Congress in 1995. I think this is a very interesting conception, too. Culturally, that would be something for people to think about: what does the idea of a “trust” mean here in Hawai‘i? The trust relationship between the U.S. and its protectorates is quite different from the “Indian trust.” Which form is a better fit for the Native Hawaiian people?

The third model is that of the domestic dependent nation, and I think the Akaka Bill exemplifies this model. The formation of a “Hawaiian governing entity” is a key component of this process. The Akaka bill contemplates a structure similar to a tribal council under the Indian Reorganization Act (IRA), which means that, upon its creation, this would be the only Native Hawaiian government that the United States would ever acknowledge. If the Kingdom of Hawai‘i tried to assert its sovereignty in modern form, it would suffer the same fate as the “traditional” Native governments that continue to resist the IRA tribal councils. They are simply not recognized as valid governments by the United States. Now, the United States will try to tell the Hawaiian people that this is the only way to preserve any political status as a group, and that the alternative is to have NO status. That is a very serious threat, particularly in light of the current cases that are being litigated to take away existing Native Hawaiian rights. So, it seems reasonable that many Native Hawaiian people might be anxious to accept the benefits of the Akaka Bill. However, let’s look at some of the challenges. The Akaka bill is only a preliminary start to the process of becoming a domestic dependent nation. It will take time to form the governing entity, define the membership, and establish the parameters of its relationship with the United States. The relationship between the U.S. and the Native Hawaiian governing entity is similar to that of American Indians, but NOT identical. It will take time to resolve the land issues. Will the Native Hawaiian governing entity be a land-based government? Will it be more analogous to the Native corporations in Alaska? Will the government have jurisdiction? Will it have court systems? Will non-Natives be subject to its jurisdiction? Will individual homestead rights be subsumed within the government structure? Will all islands

be subsumed within the governing entity? Will they require separate representation? Will the federal government maintain a full “trust relationship” with Native Hawaiians that includes creating a bureaucratic structure and offering sufficient appropriations? They did not want to do this in Alaska, and today, the movement toward “trust reform” seeks to minimize the federal role. Why would the U.S. government fund the creation of an entirely new infrastructure for Native Hawaiian people? There are many challenges to think about.

Why would the United States be in favor of this model? I think there are two primary reasons. First of all, as I understand it, there are many unresolved land issues here in Hawai‘i that involve Native claims. This can and probably has created “clouds” on land titles, which is problematic for development. It is in the United States’ best interest to extinguish any lingering claims, perhaps through payment of compensation and then, by confirming title to the remaining lands in one entity, such as the Native Hawaiian governing entity. Right now, there may be so many different claimants that it may be impossible to enter a negotiation. This problem is best addressed by creating one entity that has the legal authority to negotiate and bind all other Native Hawaiian claimants. Secondly, the United States has a tradition of treating all Native peoples the same and ignoring historical differences. This tradition helps confirm the legitimacy of the plenary power/trust doctrines within federal Indian law as being tied to the cultural status of Native peoples as “indigenous,” rather than having to engage any differences in political status that might call for a different political relationship with the United States. So, when Alaska Natives asserted the differences in their situation, given their history with Russia, and when the Supreme Court had to assess the political status of the Pueblo Nations, given the fact that they had formal land grants and status as citizens of Mexico, the Court simply held that those differences were irrelevant. What mattered is that they were all “Indians” and they had a distinctive cultural identity that justified their treatment as “dependents” of the United States. As “Indians,” their land rights

75 See, e.g., United States v. Sandoval, 231 U.S. 28, 28-39 (1913) (finding that the Pueblos were Indians in “race, customs and domestic government” which justified their political status as “dependents” requiring “special consideration and protection’); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (finding the historical differences with Russia irrelevant given that “the Tee-Hit-Tons were in a hunting and fishing stage of civilization” Id. at 287. Therefore the Tee-Hit-Tons'
were not fully recognized, nor were their claims to sovereignty. So, under United States jurisprudence, the cultural attributes of Native people end up defining their political status as “domestic dependent nations.” So, what can the United States say about Native Hawaiians? The historical differences are extraordinary, the nature of the land claims appear to be very distinctive, and it is a huge leap to say that the Kingdom of Hawai‘i has been transformed into a “domestic dependent nation.” However, Native Hawaiian people ARE the “indigenous” people of Hawai‘i. So, using the rationale that cultural status defines political status, the United States can remain committed to this path.

There is a fourth possibility. I don’t know that it was present in the dialogue about the Akaka bill, but it is relevant in terms of what is happening in Canada. There is a new territory in Canada called “Nunuvat,” which is a distinctively Inuit territory, although it is constituted as a province of Canada in terms of its overall structure. The character of Nunuvut is perceived to be more “indigenous” than any other province of Canada, allowing for new forms of territorial rights, language rights and educational rights, but the self-determination of the Inuit people is expressed through a domestic, democratic participatory structure, rather than as an “independent nation.” So, it is an interesting hybrid, and it is so new that many people are still wondering how it will all work out. For our purposes, it merely illustrates one of the many contemporary possibilities in re-imagining indigenous nationhood.

So, how should we go about re-imagining the Nation of Hawai‘i today? The political history of this place is very important, including the Kingdom of Hawai‘i’s international recognition, the treaties, the politics of statehood, the apology bill, the trust and how the trust is expressed here, the federal presence, the state presence, the blood quantum issue, Hawaiian Home Lands (the blood quantum issue is present there), the Office of Hawaiian Affairs structure, the lands, land titles and what happened to those titles. Even if the ultimate decision is to accept status as a “domestic dependent nation,” there is a need for a government, land and territory, and a legal system, including laws and courts. In addition, the cultural history of this place and its people is extraordinarily important and that is part of the process of reclaiming cultural sovereignty. As I read through the use of these lands was like the use of the nomadic tribes of the States Indians” Id. at 288.).
transcripts of the meetings last year, a number of people asked “What would Queen Lili‘uokalani have said about the Akaka Bill”? I think that is a beautiful question. It is a really important question. I started to read through her writings in preparation for this lecture, just to get a sense of who she was and how she thought about things. I think that would be a great dialogue to have.

IV. CONCLUSION

In closing, I want to share one additional thought. I got really angry when I was reading Waldron’s article, so angry that at times I had difficulty following his argument. One sentence in his article was particularly upsetting, because he dismissed indigenous claims as having a “mystical quality” that was totally without merit and was merely used to concoct some romanticized version of indigenous rights. So, I was mad about that, and I thought “Well, what is he talking about? What does he mean?” And then it struck me that what he was most afraid of, and I think what most of the people who are antagonistic to Native rights are afraid of, is spirit. They are afraid of the spirit that underlies indigenous claims. Because you can kill the physical body through genocide, and you can control the mind through colonialism, education, and substances such as alcohol or drugs. But as long as the spirit is alive, then the nation is alive. And that is the biggest threat of all. So, when I come here, I know that the spirit of the Kanaka Maole people is alive, and that connection between the ancestors and us is alive and present here and also present in all of the nations that we come from. And I honor that today. I honor all of the people here who are working so hard to define what needs to be done right now. It is an extraordinarily important moment in time and there are people with all different views who are passionate and feel strongly about preserving what is here for the next generations to follow. And so I am in support of all of you and in deep admiration of all of you. And I thank you for listening to me this evening.