Accessing Traditional Kīpuka:
Protecting the Storehouse of Knowledge Through the Rule of Law

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I. EIA HAWAI‘I, HE MOKU, HE KANAKA: HERE IS HAWAI‘I’S MAN, LAND, AND CULTURAL KĪPUKA

In a 19th century publication, Hawaiian scholar and historian, David Malo, outlines inoa of land and land features. He notes that the people of old had two names for islands; one being “moku” and one being “āina.” Whereas a moku is identified because it is “cut off” into the ocean, when kānaka reside on the land, a reciprocal relationship emerges and it becomes ‘āina, that which feeds. This defining interaction between man and ‘āina is indicative of kānaka’s relationship with land; one that informs the ways in which kānaka operate within and alongside their natural counterparts.

This worldview is but one example of ‘ike encapsulated within cultural kīpuka. These cultural kīpuka, like a “kīpuka of vegetation formed

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1 Mary Kawena Pukui & Samuel H. Elbert, HAWAIIAN DICTIONARY 101 (1986) [hereinafter Pukui & Elbert] (defining inoa as “name, term, title”).
2 Id. at 11 (defining defining ‘āina as “land, earth”).
3 David Malo, MO‘OLELO HAWAI‘I, 36-37 (Nathaniel B. Emerson, trans., 1898) [hereinafter Malo].
4 Pukui & Elbert, supra note 1, at 96 (defining ‘ike as “knowledge, understanding, etc.”).
5 Id. (defining kīpuka as “Variation or change of form (puka, hole), as a calm place in a high sea, deep place in a shoal, opening in a forest, openings in cloud formations, and especially a clear place or oasis within a lava bed where there may be vegetation.”).
by the fluid paths of lava surrounding a patch of forest,” are storehouses of traditional knowledge; one that informs present-day conceptualizations of the individual. For these reasons, the preservation of ‘āina – and the kīpuka that inform relationships with it – is integral to kānaka wellbeing as a native individual and as a human right.

Certainly, the Hawai‘i State and Federal Governments have taken steps to codify laws aimed at protecting the environment and kānaka traditional and customary rights. Unique to Hawai‘i, the Hawai‘i State Constitution was amended in 1978 to “provide further protection for traditional and customary rights” to Native Hawaiians. Since then, the scope of Article XII, Section 7 has been narrowly interpreted to define the circumstances of the practice: area (“undeveloped or less than fully developed”) and the definition of claimed right, etc.

Alongside this constitutional protection, Hawai‘i Revised Statutes sections 1-1 and 7-1 also represent sources of law aimed at preserving

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6 Zachary Alaka‘i Lum, Nā Hīmeni Hawai‘i: Transcending Kūʻē, Promoting Kūpaʻa 37 (2017). Mele as kīpuka “preserve a small but detailed view of what once was . . . . It only takes a visit to this kīpuka, when the mele is sung or read again, for all that is preserved within the mele to be accessed, and thus, re-experienced, re-contextualized and made relevant to the listener or reader.” Id.

7 See Davianna Pōmaika‘i McGregor, Hawaiian Sustainability, The Value of Hawai‘i: Knowing the Past, Shaping the Future 209-216 (Craig Howes & Jon Osorio, eds., 2010) (discussing the significance of cultural kīpuka as “natural reminders of the origins of our islands and the delicate native species . . . . They also serve as a model of our potential as an island society to sustain our way of life, despite global economic and social trends.”); Noelani Goodyear-Kaʻōpua, The Seeds We Planted Portraits of a Native Hawaiian Charter School 8 (2013) (discussing the value of cultural kīpuka and its growth).

8 See Noenoe K. Silva, The Power of the Steel-Tipped Pen: Reconstructing Native Hawaiian Intellectual History 4 (2017) (highlighting that “aloha ʻāina is a complex concept that includes recognizing that we are an integral part of the ʻāina and the ʻāina is an integral part of us.”); Kekuewa Kikiloi, Rebirth of an Archipelago 75 (2010) (asserting that “ʻāina sustains our identity, continuity, and well-being as a people.”).


13 Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n, 94 Hawai‘i 31, at 43 nn.19-21, 7 P.3d at 1068 nn. 19-21 (Haw. 2000).
traditional and customary rights. While Article XII, Section 7 amendment of the Hawai‘i State Constitution reaffirms rights “customarily and traditionally exercised for subsistence, cultural, and religious purposes.”

Recent cases have primarily focused on access and gathering rights. Protecting traditional and customary rights for “cultural and religious purposes” has largely fallen to the wayside for a number of possible reasons.

Even with such protections, continued conflicts, such as, overuse of land and mismanagement of land and resources have given rise to protests by the Native Hawaiian community. At the heart of these disputes are different – and often times, competing – value systems. These conflicts have highlighted the need to further protect and legitimize these rights for Kānaka Maoli. Further, such measures would assist the operationalization of statutory and constitutional protections.

While Native Hawaiians work to sustain and nourish their historical and familial relationship to land – preserved in these kīpuka – contemporary notions of private property and the treatment of resources as commodities do not align. Coupled with the growing consciousness of the continued injustice connected to the overthrow of the Hawaiian Kingdom in 1893 (“Overthrow”) and surrounding effects of colonization, these conflicts are resulting in dangerous – yet courageous – aloha ʻāina confrontation.

A. Ka Piko Kaulana o ka ʻĀina: Mauna Kea, the Convergence of Conflict

As early as 1964, Governor John A. Burns, alongside Hawai‘i County’s Board of Supervisors, laid the groundwork to fund the development of the Mauna Kea Access road for a “one-year test program.” While this program aimed to evaluate “the future investment in the Mauna

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14 HAW. REV. STAT. § 1-1 (2013); HAW. REV. STAT. § 7-1 (2013).
15 HAW. CONST. art. XII, § 7 (1978).
16 Id.
Kea area as an observatory site,"19 the State of Hawai‘i ("State") would make an initial $42,000 investment in the access road.20 Over the course of the next fifty years, Mauna Kea would become host to thirteen telescopes.21 Mauna Kea, the piko,22 “of the island-child, Hawai‘i, and that which connects the land to the heavens”23 would also become the convergence of conflict as a the “world's premier site for ground-based astronomical observatories.”24

Fast forward to 2007, Kānaka “temporarily halted plans for the Outriggers Project, a $50 million addition . . . on Mauna Kea’s summit.”25

This uprising would be the first of many protests to Mauna Kea’s use as an astronomy site. In October 2014, in opposition to the largest construction project to date, a few ‘eleu26 community members mobilized to protest a ground-breaking ceremony for the proposed Thirty Meter Telescope (“TMT”) on Mauna Kea.27 This began the months-long physical conflict at the summit of Mauna Kea; with a series of judicial decisions that would also highlight the growing discourse of mismanagement and the law’s seeming failure to protect Native Hawaiian sacred spaces.

What began as a few kānaka ‘eleu stopping a groundbreaking ceremony would swell into a larger movement by the broader community. Protests were made up of students, teachers, professors, lawyers, mele practitioners, musicians, kūpuna, and hula practitioners. In short, a wide-range of Kānaka Maoli were united in cause and in protest. The opposition took various forms. Kānaka Maoli dedicated their lives to living on Mauna Kea. Musicians and mele practitioners made the trek atop Mauna Kea to

19 Id.

20 Id. at 56-69.


22 Pukui & Elbert, supra note 1, at 328 (defining piko as “navel, umbilical cord, blood relative, summit or top of a hill or mountain, crest, crown of the head.”).

23 Kepa & Maly, supra note 18.


25 David L. Callies, REGULATING PARADISE LAND USE CONTROLS IN HAWAI’I 287 (2d ed. 2010).

26 Pukui & Elbert, supra note 1, at 41 (defining ‘eleu as “active, alert, energetic, quick”).

lend their voices. Hula practitioners gathered to hoʻomana\textsuperscript{28} the ʻāina mauna during the world-famous Merrie Monarch Hula Competition. Pictures of these performances were striking, illustrating the collective energies and commitment to ʻāina as an integral part of the cultural practice of hula. There were social-media campaigns and hashtags garnering the star power of Hollywood and national attention. But the largest and most dangerous conflict would arise in 2015 when construction of TMT was to begin and protectors would block access to the roads. With hundreds of people blocking construction vehicles, eight people were arrested in a contentious confrontation.\textsuperscript{29} With the Supreme Court’s final decision allowing the TMT to move forward in October 2018, the swell of conflict may again arise to respond and protect the ʻāina.

This conflict is illustrative of the disconnect of differing values: between contemporary notions of private property and Native Hawaiians’ historical and familial relationship to ʻāina. In the case of Mauna Kea, scientists see a premiere location for an astronomy observatory while kānaka see a sacred place of worship requiring protection.\textsuperscript{30} Developers pursue the State’s requirements for granting a permit (subject to a prior invalidation for lack of due process\textsuperscript{31}) and kānaka feel left out of the process and subsequent decisionmaking.\textsuperscript{32} What results is conflict; and in the case of both Mauna Kea and Haleakalā, dangerous confrontation and protests.\textsuperscript{33} This mis-alignment of values “give[s] rise to different understandings of human rights and responsibilities in relation to the natural world and what people can and cannot do with it.”\textsuperscript{34} As such, a conflict between these competing views arises and a competition between these two conflicting worldviews begins.

\textsuperscript{28} Pukui & Elbert, supra note 1, at 235 (defining hoʻomana as “to place in authority, empower, worship, etc.”).


\textsuperscript{31} See id.

\textsuperscript{32} See id.

\textsuperscript{33} See Inefuku, supra note 29.

\textsuperscript{34} Catherine Iorns Magallanes, Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment, 6 Victoria U. of Wellington Legal Res. Papers 273, 273 (2016) [hereinafter Maori Cultural Rights].
B. Ensuring Space for Cultural Kīpuka through the Rule of Law

How can laws better accommodate Native Hawaiian cultural kīpuka? Why is it important? Can these kīpuka help to inform the rule of law? This article explores, then builds upon these fundamental questions, aiming to explain fully the importance of doing so. Considering these practices and worldviews, the first portion of this article examines the existing legal framework in Hawai‘i and will assert ways in which that legal framework can work to support traditional notions of cultural kīpuka in order to adequately protect places and natural resources. Successful integration of seemingly opposing values will not only mitigate these increasing conflicts and advance Native Hawaiian human rights, but will necessarily uphold the State of Hawai‘i’s trust duties and the Federal Government’s political relationship and obligations to the Native Hawaiian people.35

The second portion of this article then identifies the limitations of existing framework and looks to build infrastructure to ensure it adequately protects the interests of Native Hawaiians. Further, this section advocates for additional protections and offers ways in which they can be implemented. For a comparative example, this piece will explore the way that New Zealand law has “upheld the Maori cosmological view of nature as an ancestor and devised a legal framework for better protecting its interests.”36 Finally, we consider whether this example might be beneficial to Native Hawaiians in Hawai‘i.

Access to and understanding of traditional storehouses of knowledge – cultural kīpuka – help to facilitate the protection of existing ʻāina and resources within the rule of law. But it is not enough that the existing kīpuka are simply preserved. The law must acknowledge the historical ʻike preserved within these kīpuka while also accommodating the dynamic and living nature of Native Hawaiians. As this article will later explore, expanding these kīpuka through the rule of law provides a unique opportunity for the wellbeing of kānaka, the environment, and Hawai‘i pae ʻāina, alike.37

35 See, e.g., HAW. CONST. art. XII § 7 (1978); Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921); G.A. RES. 61/295, 2007 Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (Article 8 providing “1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”) (Article 11 providing “1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”).


37 See NOELANI GOODYEAR-KA’ŌPUA, THE SEEDS WE PLANTED PORTRAITS OF A
II. EXISTING LEGAL FRAMEWORK

The State of Hawai‘i’s laws currently provide a framework intended to protect the traditional and customary rights of Native Hawaiians. These rights also inform the protection of Hawai‘i’s lands, resources, and people. Alongside those provisions, International Agreements also give rise to additional protections and obligations through the basis of human and indigenous rights. With these duties in mind, the State and its courts have “affirmed and expanded the scope of Native Hawaiian traditional and customary rights,” codified in historical State law and in the 1978 constitutional amendment.

The historical context of these constitutional and statutory provisions embody a response from both the local and international communities to the injustices suffered by Kānaka Maoli as a result of colonization. Hawai‘i’s unique legal regime promotes ideals of restorative justice to address these inequities. The court’s interpretation of these provisions should also consider and reflect the restorative justice underpinnings in reaching its decisions.

NATIVE HAWAIIAN CHARTER SCHOOL 8 (2013) (highlighting that “For kīpuka to be able to regenerate life, they must grow.”).

38 See HAW. CONST. art. XII § 7 (1978); HAW. REV. STAT. § 1-1 (2013); HAW. REV. STAT. § 7-1 (2013).


40 Forman & Serrano, supra note 11, at 821.


42 Restorative justice “seeks to transform the way society thinks about how to reconcile wrongful acts with an emphasis on repairing injustice.” Melody Kapilialoha MacKenzie, Historical Background, NATIVE HAWAIIAN LAW: A TREATISE 342-46 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat, eds., 2015); see also Melody Kapilialoha MacKenzie et al., Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources, 21 NAT. RESOURCES & ENV’T 37, 38 (2007) ("restorative environmental justice is in large part about doing justice through reclamation and restoration of land and culture.").
A.   Constitutional and Statutory Provisions Protecting Traditional and Customary Rights

Against the backdrop of rising consciousness now known as “The Hawaiian Renaissance,” the 1978 Constitutional Convention produced an amendment specifically aiming to protect Native Hawaiian rights. This amendment, now codified as Article XII, Section 7, was “intended to provide a provision in the Constitution to encompass all rights of native Hawaiians” and reads:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate those rights.

Since its adoption, Article XII, Section 7 of the Hawai‘i State Constitution has been the subject of vast scholarship and several major court cases. Perhaps a shining illustration of its necessity, Article XII, Section 7 has been used as a platform alongside historical and statutory bases protecting access and traditional and customary rights for Native Hawaiians.

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44 This article uses the term Kānaka Maoli to refer to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain Cook in 1778, regardless of the arbitrary measure of blood quantum. When necessary, the term “Native Hawaiian,” capitalized, is used broadly to mark the unique legal and political status of Kānaka Maoli in Hawai‘i. See also Melody Kapilialoha MacKenzie, Historical Background, NATIVE HAWAIIAN LAW: A TREATISE 6 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua’ala Sproat, eds., 2015) (highlighting that “Kānaka Maoli trace their ancestry to the ‘āina (land), to the natural forces of the world, and to kalo (taro), the staple food of the Hawaiian people.”); Davianna Pōmaika‘i McGregor, The Cultural and Political History of Hawaiian Native People, OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 335-36 (Gregory Yee Mark, Davianna Pōmaika‘i McGregor & Linda A. Revilla eds., 1996) (noting that the “Hawaiian people are the living descendants of Papa, the earth mother, and Wakea, the sky father... This unity of humans, nature and the gods formed the core of the Hawaiian people’s philosophy, world view and spiritual belief system.”).

45 Forman & Serrano, supra note 11, at 787.

46 Id.


48 HAW. CONST. art. XII § 7 (1978).

49 Id.
Hawaiians. However, the Hawai‘i Supreme Court’s sequence of interpretations, while repeatedly reaffirming traditional and customary rights has continued to narrow the scope of these provisions, placing burdens and conditions on their reach and effectiveness. Further, the State has struggled to actualize the textual commitments to Native Hawaiians.

1. Article XII Section 7, HRS Section 1-1, and HRS Section 7-1

In *Kalipi v. Hawaiian Trust Co.*, the court’s initial consideration of Article XII, Section 7, the court qualified the right to gather in three significant ways, setting the precedent for judicial construction of Customary Rights. First, the court held that the tenant must reside within the ahupua‘a he/she seeks to enter. Second, the tenant must be entering for “the purposes of practicing [N]ative Hawaiian customs and traditions.” And finally, the land must be undeveloped since “exercise of such rights [on developed land] . . . would conflict with Western concepts of property law.”

Discussing the Hawaiian usage exception under HRS section 1-1, the court opined that “the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.” Here, the court first requires that tenants be “on” the land within the specific area. Once this is established, the court then weighs the “interests” attached to the custom and the “harm” done to the opposing party or property.

While *Kalipi* failed because of the ahupua‘a boundary requirement, the court in *Pele Defense Fund v. Paty,* refined this requirement to allow practices beyond ahupua‘a boundaries. The court reasoned that the

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50 See Forman & Serrano, supra note 11, at 787-91; see also HAW. REV. STAT. § 1-1 (2013); HAW. REV. STAT. § 7-1 (2013).
51 See *Kalipi*, 66 Haw. at 12, 656 P.2d at 752; *PASH*, 79 Hawai‘i at 438, 440, 903 P.2d at 1259, 1261; *Pele Def. Fund v. Paty*, 73 Haw. at 619, 837 P.2d at 1271.
52 See *Kalipi*, 66 Haw. at 12, 656 P.2d at 752; see also Forman & Serrano, supra note 11, at 801-03.
53 See *Kalipi*, 66 Haw. at 7-9, 656 P.2d at 749-50.
54 Id.
55 Forman & Serrano, supra note 11, at 793.
56 *Kalipi*, 66 Haw. at 10, 656 P.2d at 750-51.
57 See id. at 749; see also Forman & Serrano, supra note 11, at 786.
58 See *Kalipi*, 66 Haw. at 10, 656 P.2d at 750-51; see also Forman & Serrano, supra note 11, at 786.
59 *Pele Defense Fund*, 73 Haw. at 578, 837 P.2d at 1247.
constitutional protection of these rights was not just grounded in and limited by land ownership, but rather, was premised by “the practiced customs of Native Hawaiians” under HRS sections 1-1 and 7-1 as well.\(^{60}\) The Supreme Court of Hawai‘i held that under Article XII, Section 7, “traditional and customary rights could be exercised for subsistence, cultural, and religious purposes on undeveloped lands beyond the ahupua‘a of residence, provided that ‘such rights have been customarily and traditionally exercised in this manner.’”\(^{61}\)

This decision was especially significant because it contextualized the traditional and customary rights within the customs of Native Hawaiians rather than simply juxtaposing Western notions of private property rights against native hoa‘āina notions of land. Again, the court required a showing that these rights were one, customary, and two, traditional. To succeed, the plaintiffs provided “persuasive kama‘āina (native born) testimony and affidavits” in favor of their traditional and customary rights in the asserted area.\(^{62}\)

Expanding the court’s reasoning in Pele Defense Fund, the court in Public Access Shoreline of Hawai‘i (PASH) again reaffirmed these rights under Article XII, Section 7 of the Hawai‘i Constitution.\(^{63}\) Here, the court ultimately held that the State is “obligated to protect the reasonable exercise of traditional and customary rights to the extent feasible under the Hawai‘i Constitution and relevant statutes.”\(^{64}\) Thirteen years after the court first decided Kalipi, the PASH decision outlined “elements of the custom doctrine” in its landmark opinion to include:

1) The date “by which Hawaiian usage must be fixed” as November 25, 1892;\(^{65}\)


\(^{61}\) Ho’ohana Aku supra note 41, at 13 (quoting Pele Defense Fund, 73 Haw. at 620, 837 P.2d at 1272).

\(^{62}\) Pele Defense Fund, 73 Haw. at 620-21, 837 P.2d at 1247; Forman & Serrano, supra note 11, at 795.

\(^{63}\) PASH, 79 Haw. at 448, 903 P.2d at 1269; see also HAW. CONST. art. XII § 7 (1978); Pele Defense Fund, 73 Haw. at 578, 620, 837 P.2d at 1247, 1272.

\(^{64}\) See also Forman & Serrano, supra note 11, at 796 (citing PASH, 79 Haw. at 437, 903 P.2d at 1258 (holding “the [Hawai‘i Planning Commission] is obligated to protect customary and traditional rights to the extent feasible under the Hawai‘i Constitution and relevant statutes.”)).

\(^{65}\) Forman & Serrano, supra note 11, at 797 (citing PASH, 49 Haw. at 447, 903 P.2d at 1268).
2) The “right of each ahupua’a tenant” remains intact subject to regulation;66
3) The current version of HRS section 7-1 includes the “repeal requirement that the right or use be peacable and free from dispute;”67
4) The reasonableness factor includes the principle that the custom will be “recognized as long as there is no good legal reason against it;”68
5) “[A] particular custom is certain if it is objectively defined and applied; certainty is not subjectively determined;”69
6) The State has the authority to “reconcile competing interests,”70 including preventing practice on land that is “fully developed”71 though it cannot “regulate the[se] rights out of existence;”72
7) “[C]onsistency is properly measured against other customs, not the spirit of present laws[.]”73

Further, the court again reiterated the balancing test in Kalipi asserting that “[t]he precise nature and scope of the rights retained by [HRS section] 1-1 . . . depend on the particular circumstances of each case.”74

Most notably, the court in PASH provided judicial clarification75 of rights being “traditionally and customarily exercised”76 in a manner consistent with the asserted practice and required that these practices are asserted on less than “fully developed land.”77 The court refused to “scrutinize the various gradation in property use that fall between the terms

66 Id.
67 Forman & Serrano, supra note 11, at 797 (citing PASH, 49 Haw. at 446, 903 P.2d at 1267).
68 Forman & Serrano, supra note 11, at 797 (citing PASH, 79 Haw. at 447 n.39, 903 P.2d at 1268 n.39) (internal quotation marks omitted).
69 Id.
70 Id.
71 Id. (citing PASH, 79 Haw. at 451, 903 P.2d at 1246, 1272).
72 Id.
73 Forman & Serrano, supra note 11, at 798 (citing PASH, 79 Haw. at 447, 903 P.2d 1246 at 1268 n.39) (internal quotation marks omitted).
74 Forman & Serrano, supra note 11, at 797 (citing PASH, 79 Haw. at 438, 440, 903 P.2d at 1259-61 (quoting Pele Def. Fund, 73 Haw. at 620, 837 P.2d at 1271)); see also Kalipi, 66 Haw. at 12, 656 P.2d at 752.
75 See HO’OHANA AKU, supra note 41, at 11.
76 HO’OHANA AKU, supra note 41, at 11.
77 PASH, 79 Hawai’i at 425, 903 P.2d at 1246.
‘undeveloped’ and ‘fully developed.’”

Even so, the PASH court held that “allow[ing] or enforc[ing] the practice of traditional Hawaiian gathering rights” on fully developed land would be “inconsistent” with property law; even with Hawai‘i’s caveat for Native Hawaiian customs.

In line with the court’s consideration of property interests, the court also requires that the “interests of the property owner and hoa‘āina must be balanced” and that such a balance “weighs in favor of the property owner against hoa‘āina who exercise otherwise valid customary rights in an unreasonable manner.”

While the court held that the State was obligated to protect these constitutional and statutory rights, and while the absolute “preservation of such lands” is not required, the “State does not have the unfettered discretion to regulate the rights of ahupua‘a tenants out of existence.” This last statement is an important one that will be further discussed later in this article.

In State v. Hanapi, a criminal trespass case in which the defendant “asserted a defense of privilege upon his constitutional rights as a Native Hawaiian,” the court held that “it is the obligation of the person claiming the exercise of a Native Hawaiian right to demonstrate that the right is protected.” To do so, the claimant must establish an “adequate foundation . . . connecting the claimed right to a firmly rooted traditional or customary [N]ative Hawaiian practice.” This burden of proof, while not met in Hanapi, is applicable only in the criminal context.

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78 Id. at 1271.
79 Id. at 1272.
80 See Ho‘ohanaha Aku, supra note 41, at 15.
81 Ho‘ohanaha Aku, supra note 41, at 16; see PASH, 79 Hawai‘i at 425, 903 P.2d at 1246.
82 Id. at 1258.
83 Id. at 1272.
84 Id. at 1272; see also Forman & Serrano, supra note 11, at 787.
85 See Hanapi, 89 Hawai‘i at 177, 970 P.2d at 485; see also Ho‘ohanaha Aku, supra note 41, at 802 (discussing that a defendant must show three minimum factors to “establish that his or her conduct is constitutionally protected as a [N]ative Hawaiian right.” Two of the three include a showing as Native Hawaiian as defined in PASH and the undeveloped land requirement highlighted in Kalipi.).
86 Forman & Serrano, supra note 11, at 802.
87 Forman & Serrano, supra note 11, at 801; see also Hanapi, 89 Hawai‘i at 177, 970 P.2d at 485, recons. denied, 1999 Haw. LEXIS 34 (Haw. Feb. 8, 1999).
88 Hanapi, 89 Hawai‘i 177 at 187, 970 P.2d at 495.
89 Id.
Finally, in *Ka Paʻakai O Ka ‘Aina v. Land Use Commission (Ka Paʻakai)*,\(^{90}\) the court laid out a framework to ensure responsible state agencies “conduct detailed inquiries into the impact” \(^{91}\) on Native Hawaiian traditional and customary rights when “balancing their obligations” to protect said rights.\(^{92}\) Together, the court required a finding of:

1. The identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the petition area;
2. the extent to which those resources – including traditional and customary [N]ative Hawaiian rights – will be affected or impaired by the proposed action; and
3. the feasible action, if any, to be taken by the Land Use Commission to reasonably protect [N]ative Hawaiian rights if they are found to exist.\(^{93}\)

This framework, outlined by the *Ka Paʻakai* court in 2000, seeks to balance the growing competing interests between Native Hawaiian traditional and customary cultural rights alongside the ever-growing private property interests.\(^{94}\) Here, the court endeavors to adhere to the State’s constitutional duty while “reasonably accommodating competing private [property] interests[.]”\(^{95}\) Regardless, *Ka Paʻakai* is monumental for its recognition of the State’s “affirmative duty . . . to preserve and protect traditional and customary [N]ative Hawaiian rights”\(^{96}\) and for providing the framework for agencies to employ when evaluating competing interests.

While Article XII, Section 7 of the Hawai‘i State Constitution reaffirms rights “customarily and traditionally exercised for subsistence, cultural, and religious purposes,”\(^{97}\) recent cases have primarily focused on access and gathering rights.

2. **Public Trust Doctrine – Haw. Const. Art. XI § 1**

Aliʻi Nui were the protectors of the makaʻāinana sheltering

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\(^{90}\) *Ka Paʻakai*, *supra* note 12.

\(^{91}\) *HOʻOHANA AKU*, *supra* note 41, at 16.

\(^{92}\) Forman & Serrano, *supra* note 11, at 798.

\(^{93}\) Id. at 799 (citing *Ka Paʻakai*, 7 P.3d at 1073).

\(^{94}\) See id. at 799 (citing *Ka Paʻakai*, 7 P.3d at 1073).

\(^{95}\) Id. (quoting *Ka Paʻakai*, 7 P.3d at 1073).

\(^{96}\) Id.

\(^{97}\) HAW. CONST. art. XII § 7.
them from terrible unseen forces . . . should a famine arise, the Aliʻi Nui was held at fault and deposed . . . should an Aliʻi Nui be stingy and cruel to the commoners . . . he or she would cease to be pono, lose favor with the Akua and be struck down, usually by the people . . . . A reciprocal relationship was maintained: the Aliʻi Nui kept the ʻĀina fertile and the Akua appeased; the makaʻāinana fed and clothed the Aliʻi Nui.98

Leaders, in a traditional “precolonial, precapitalist time”99 were regarded and evaluated by their success with managing people and ʻāina to whom they were responsible.100 This idea is encapsulated in the Public Trust Doctrine;101 its applicability proving more relevant in modern days. The origins of the Public Trust Doctrine extend from “the time of the Hawaiian Kingdom;”102 surviving the 1848 Māhele, the court’s interpretation in Zimring,103 and finally, codified in the Hawaiʻi Constitution as a “fundamental principle of constitutional law in Hawaiʻi.”104 This doctrine encapsulates the idea that Hawaiʻi’s lands were not owned by the sovereign, but rather, the land “belonged to the chiefs and people in common.”105 The Public Trust Doctrine imposes another constitutional duty upon the State to effectively manage Hawaiʻi’s land and natural resources.106

In 1978, Article XI, Section 1 was codified in Hawaiʻi’s Constitution and provides that “[a]ll public natural resources are held in trust by the State for the benefit of the people.”107 The constitutional duty has been interpreted

101 See Hoʻohana Aku, supra note 41, at 29; see also Forman & Serrano, supra note 11, at 819-20.
103 See id. at 735 (holding “that the State held lava extensions in public trust for the benefit of the populace”).
104 In re Water Use Permit Applications (Waiāhole I), 94 Hawaiʻi 97, 9 P.3d 409 (Haw. 2000).
106 See HAW. CONST. art. XI, § 1.
107 HAW. CONST. art. XI, § 1:
to impose the “dual concept” of kuleana – “of sovereign right and responsibility” upon the “legislative and executive branches.” This kuleana requires the balancing of the “constitutional protections and conservation of public trust resources, on one hand, and the development and utilization of those resources on the other.” When public and private interests compete, however, this kuleana requires a “presumption in favor of public use, access, and enjoyment.” As a steward of these resources, the court has interpreted the Public Trust Doctrine to impose a “continuing trust obligation” upon the State.

Therefore, the State has a constitutional obligation to protect and advocate for the use and protection of Hawaiʻi’s land and resources. This duty finds its basis in centuries of traditional practice, law, and judicial interpretation. Viewed alongside Native Hawaiian traditional and customary rights enshrined in Article XII, Section 7, the Public Trust Doctrine gives the State Government a distinct duty to protect Hawaiʻi’s lands and resources not only for the broad public, but especially for the Native Hawaiian people. However, while there can be little doubt on the State’s intention to protect these rights, the State’s practices have still failed to fully protect Hawaiʻi’s land and resources for both the broad public and Native Hawaiians.

a. International Obligations Protecting Cultural Kīpuka

While the State’s statutory and constitutional duties place a definite duty and obligation to protect Native Hawaiian traditional and customary rights and resources, the State should also be guided by International obligations and practices. Beyond Native Hawaiian’s ancestral and historical moʻokūʻauhau that stewards constitutional protections like Article XII, Section 7, and Article XI, Section 1, and statutory provisions like HRS sections 1-1 and 7-1, international sources of law recognize and protect

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people. Id.

108 Waiāhole I, 94 Hawaiʻi 97, 9 P.3d 409.


110 See id.

111 See Waiāhole I, 94 Hawaiʻi at 97, 9 P.3d at 409.

112 Mauna Kea Anaina Hou, 136 Hawaiʻi at 376, 363 P.3d at 224 (Pollack, J., concurring).
Native Hawaiian rights as fundamental rights for indigenous peoples. The growing attention to and protection of indigenous peoples’ rights are beginning to play a crucial role in the advancement of indigenous knowledge and practices. In many cases, this indigenous knowledge plays a vital role in confronting global issues.113

Alongside these local State protections, the protection of Hawai‘i’s resources is recognized as a fundamental human right to indigenous peoples.114 In particular, two declarations, the Organization of American States’ Declaration on the Rights of Indigenous People and United Nations Declaration on the Rights of Indigenous People (“UNDRIP”) serve as guiding principles for the member states that support these organizations.

(1) American States’ Declaration on the Rights of Indigenous People

The Organization of American States (“OAS”) is the “world’s oldest regional organization” aiming to achieve for the member states "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."115 A member of the OAS since its charter was initially adopted in 1948, is the United States.116 In 2016, the General Assembly of OAS ratified the “American Declaration on the Rights of Indigenous Peoples”117 as a “comprehensive, regional human rights instrument”118 aimed at protecting indigenous people across the Americas.119 Notably, this


118 Id.

119 See id.
declaration “affirms the rights” of indigenous people\textsuperscript{120} to “culture, lands, territories, and natural resources . . .”\textsuperscript{121}

As a product of nearly “30 years of advocacy and negotiation,” the American Declaration on the Rights of Indigenous Peoples provides another legal foundation for kānaka to assert the right to the protection of the lands and traditional and customary rights.

(2) United Nations Declaration of the Rights of Indigenous People

In 2007, the United Nations (“U.N.”) adopted the UNDRIP. This instrument became the “most comprehensive international instrument on the rights of indigenous peoples”\textsuperscript{122} and for the first time, “formally and unequivocally recognized the world’s indigenous peoples as ‘peoples’ . . . with the same human rights and freedoms as other ‘peoples.’”\textsuperscript{123} Nearly three decades in the making, the U.N. focused its efforts on the rights of indigenous peoples after a study highlighted the “oppression, marginalization and exploitation suffered by indigenous peoples.”\textsuperscript{124} While the United States, under the Bush Administration, did not initially vote to adopt UNDRIP, the Obama Administration later reversed its position.\textsuperscript{125}

While the UNDRIP itself is not a binding document, its provisions, were immediately adopted by 144 states,\textsuperscript{126} and is notable “evidence of the practice of states” and is useful as “customary international law.”\textsuperscript{127} As an International body made up of 193 member states,\textsuperscript{128} the U.N.’s collective discussion of the rights of indigenous peoples illustrates the rising consciousness and deference given to indigenous peoples at the

\textsuperscript{120} See id. (noting that this declaration provides “specific protection for indigenous peoples in North America, Mexico, Central and South America, and the Caribbean.”).

\textsuperscript{121} See id.


\textsuperscript{123} Forman & Serrano, supra note 11, at 395.


\textsuperscript{126} G.A. RES. 61/295 Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

\textsuperscript{127} Forman & Serrano, supra note 11, at 399.

Growing scholarship points to the development of international practice as eventual “binding rules of customary international law” and highlights the possibility of nation states’ adoption of UNDRIP into their own domestic law. This awareness will certainly underscore the United States and State of Hawai‘i’s obligations to the Native Hawaiian people at the international level.

III. UA LAWA ANEI? CAN THE RULE OF LAW PROVIDE ADDITIONAL PROTECTION OF CULTURAL KĪPUKA?

‘Āina [land] is a living and vital part of Native Hawaiian cosmology, and is irreplaceable. The natural elements – land, air, water, ocean – are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The ‘āina is part of their ‘ohana [family, and they care for it as they do for other members of their families. For them, the land and the natural environment [are] alive, respected, treasured, praised, and even worshiped.

The preservation of ‘āina is integral not only to the customs and practices attached to it, but ultimately, to the wellbeing of kānaka as a native individuals. Illustrated in the selection above, land and its resources are integral to Native Hawaiians’ ability to practice protected traditional and customary lifestyles. Though often viewed from a purely historical perspective, “[a]pects of Hawaiian religion are practiced today, and the basic tenets of Hawaiian religious belief are as true for many modern Kānaka Maoli as they were for their ancestors.” Kānaka Maoli are

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129 See Forman & Serrano, supra note 11, at 395-401.
130 Id. at 400.
131 See id. at 401 (discussing Bolivia’s 2007 incorporation of the Declaration “into its domestic law in its entirety.”).
132 See id. at 78 (citing Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai‘i, 177 P.3d 884, 924 (Haw. 2008)).
133 See Noenoe K. Silva, THE POWER OF THE STEEL-TIPPED PEN: RECONSTRUCTING NATIVE HAWAIIAN INTELLECTUAL HISTORY 4 (2017) (highlighting that “aloha ‘āina is a complex concept that includes recognizing that we are an integral part of the ‘āina and the ‘āina is an integral part of us.”); Kekuewa Kikiloi, REBIRTH OF AN ARCHIPELAGO 75 (2010) (asserting that “‘āina sustains our identity, continuity, and well-being as a people.”).
134 Melody Kapilialoha MacKenzie, Religious Freedom, NATIVE HAWAIIAN LAW: A TREATISE 859 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat, eds., 2015); see Malcom Nāea Chun, NO NĀ MAMO: TRADITIONAL AND CONTEMPORARY HAWAIIAN BELIEFS AND PRACTICES 167-68 (2011); John F. Mulholland,
actively utilizing and engaging in these Hawaiian religious beliefs – many of which are enshrined in cultural kīpuka.

Nearly all bodies of government have recognized the need to protect indigenous rights. The governments’ resolutions to protect indigenous rights start with acknowledging the “historic injustices . . . as a result of colonization.”\(^{135}\). It is not enough that these rights and lands are protected. This portion of this article will explore the need to create additional protections for land as an integral part to the practices that are “traditional and customary” to Native Hawaiian people\(^{136}\) by identifying the outstanding areas in need of protection.

At the outset, this article must acknowledge the history of colonization throughout Hawai‘i as well as the restorative justice underpinnings of subsequent laws. The rule of law must make additional efforts to not only protect the rights articulated in the current legal regime, but to also create distinct compensation for the injustice that its people have endured.

Even against interference by settlers, the Hawaiian Kingdom quickly adapted to its changing society; without compromising notions of a native individuals.\(^{137}\). After the “early (1778-1854) struggles with the foreigners over government and land,”\(^{138}\) the Hawaiian Kingdom quickly adopted modified versions of Western systems of governance to their own benefit and needs.\(^{139}\) As Professor Kamana Beamer illustrates, it is certainly possible – if not increasingly necessary – that both Hawaiian and Western ideals operate alongside one another.

A. Identifying the Need for Additional Protection Through the Rule of Law

Despite the constitutional, statutory and other significant protections for traditional and customary Native Hawaiian rights, these guarantees are often relegated to law books and

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\(^{135}\) G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) at 2 (“Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”).

\(^{136}\) See HAW. CONST. art. XII § 7; HAW. REV. STAT. § 1-1; see generally Forman & Serrano, supra note 11, at 821-22.

\(^{137}\) See Kamanamaikalani Beamer, NO MĀKOU KA MANA 1-16 (2014) [hereinafter No Mākou ka Mana].


\(^{139}\) See No Mākou ka Mana 1-16 (2014).
fail to come to life on the ground and in the communities with the greatest need for legal protection.\textsuperscript{140}

The courts have consistently held that the State of Hawai‘i and its administrative agencies have an obligation and a duty to protect the “reasonable exercise of traditional and customary rights” of Native Hawaiians.\textsuperscript{141} While there is little question about this duty, there is, however, uncertainty related to the scope and definition of “custom,” an effective test to balance competing interests, and mechanisms – aside from litigation – that safeguard against regulating rights out of existence.\textsuperscript{142}

1. Traditionally Exercised in this Manner

On the basis of HRS section 1-1, section 7-1, and Article XII, Section 7, the court has protected “traditional and customary rights” of Native Hawaiians.\textsuperscript{143} The court has provided some judicial clarification on the manner in which these customs must be continued.\textsuperscript{144} Other than being practiced in a “reasonable manner,”\textsuperscript{145} the court has held that they are protected if they were “traditionally and customarily exercised in that manner”\textsuperscript{146} and the \textit{PASH} court required that the custom be certain.\textsuperscript{147}

HRS section 7-1 protects gathering rights on the premise that they were “necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways.”\textsuperscript{148} Pursuant to the statute’s protection, these gathering rights remain “available to those who wish to continue those

\begin{footnotes}
\textsuperscript{140} \textit{Ho‘ohana Aku}, supra note 41, at 31.
\textsuperscript{141} Forman & Serrano, supra note 11, at 796; see also \textit{Mauna Kea Anaina Hou}, 136 Hawai‘i at 376, 363 P.3d at 224 (Pollack, J., concurring); \textit{Ka Pa‘akai}, 94 Hawai‘i at 31, 7 P.3d at 1082-83 (holding that the state has an “affirmative duty on the State and its agencies to preserve and protect traditional and customary [N]ative Hawaiian rights.” and requiring agencies to act after “independently considering the effect of their actions on Hawaiian traditions and practices.”).
\textsuperscript{142} See \textit{Ho‘ohana Aku}, supra note 41, at 58.
\textsuperscript{143} See Forman & Serrano, supra note 11, at 784-90.
\textsuperscript{144} See id.
\textsuperscript{145} See id. at 797 (citing \textit{PASH} 79 Hawai‘i 447, 903 P.2d at 1268 n.39 (opining “‘reasonableness’ concerns the manner in which an otherwise valid customary right is exercised -- in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no ‘good legal reason against it.’”)).
\textsuperscript{146} \textit{Pele Defense Fund}, 73 Haw. at 578, 837 P.2d at 1247; Forman & Serrano, supra note 11, at 796-95.
\textsuperscript{147} \textit{PASH}, 79 Hawai‘i at 447, 903 P.2d at 1268 n.39; see Forman & Serrano, supra note 11, at 796-98.
\textsuperscript{148} \textit{Kalipi}, 66 Haw. at 8, 656 P.2d at 750.
\end{footnotes}
ways.” While the continuity of custom is quite inherent in the definition, the court does not require that the custom continue uninterrupted since its fixed usage date. However, certainty is “objectively defined and applied . . . not subjectively determined.” This attention to “certainty” is problematic and contrary to Kānaka Maoli custom. In Hawaiian thought, the ‘ōlelo no‘eau, “‘a‘ohe pau ka ‘ike i ka hālau ho‘okahi,” is a testament to the variation of knowledge and practice. While this issue is mitigated by the opportunity for kama‘aina to speak to the history and traditions asserted, this does not account for the evolution of traditional practices in modern times.

Scholar and Kumu Hula, Dr. Pualani Kanaka‘ole Kanahele highlights the ability to access ancestral knowledge through mele as a guiding source of traditional knowledge. While mele – cultural kīpuka – provide a “resource for Hawaiian cultural information,” Hawaiian knowledge often “flows freely through dreams, thoughts, and participation in hula and other aspects of daily Hawaiian living.” This idea supports the concept of Hawaiian practices as a free flowing and dynamic practice; constantly evolving with ‘āina, its natural counterpart. Courts have struggled with this facet of Hawaiian practices; especially in the context of evaluating the validity of Native Hawaiian traditional and customary interests. This inconsistency often undercuts the intent of this framework and fails to actualize the protection of traditional and customary rights under the law.

2. Balancing Interests and Harm

In interpreting traditional and customary rights, the courts have determined that the State has the right to “regulate such rights.” In doing so, the court has historically balanced competing property interests.

149 Id.
150 PASH, 79 Hawai‘i at 441 n.26, 903 P.2d at 1262 n.26 (internal quotation marks omitted).
151 PASH, 79 Hawai‘i 447, 903 P.2d at 1268 n.39; see also Forman & Serrano, supra note 11, at 788.
152 Mary Kawena Pukui, ‘ŌLELO NO ‘EAU, HAWAIIAN PROVERBS & POETICAL SAYINGS 24 (1983) Translated as all knowledge is not taught in the same school, one can learn from many sources.
153 See Forman & Serrano, supra note 11, at 795; see also Pele Defense Fund, 73 Haw. at 578, 837 P.2d at 1247.
155 Id.
156 Id.
157 HAW. CONST. art. XII § 7.
requiring that “the interests of the property owner and hoa‘āina” are balanced; with the limitation that the “balance weighs in favor of the property owner” when the practice is unreasonable. 158

Hawai‘i is unique in that its land management system includes both a traditional “communal land tenure” system and a “western system of private property rights.” 159 Even then, the hybridization 160 of these two land tenure systems has led the court to find that the “western concept of exclusivity is not universally applicable in Hawai‘i.” 161 In balancing these often competing interests, the court looks to the “respective interests and harm” to reach a decision. 162

In Kalipi, the court considered the plaintiff’s asserted practice of gathering rights against western notions of property rights. 163 In determining no harm would be done by Kalipi’s assertion to gather materials, the court points out that “[section] 1-1 insures that continuance for so long as no actual harm is done thereby.” 164 While judicial interpretations of customary rights continue to cite to the “non-interference” as an “integral parts of the culture,” 165 the court fails to consider the inverse: fundamental principles of property law are disruptive to the core of Kānaka Maoli identity, culture, and practices. Against the well-established tenets of western property law, the customary rights of a largely oral-based society to undefined and dynamic “subsistence, cultural and religious” 166 practices often suffers or is entirely disregarded. Without a mechanism to adequately measure these competing ideals, the restorative justice underpinnings of Hawai‘i’s legal framework is disregarded.

3. Regulating out of Existence

The court’s decision in PASH is monumental for a number of reasons. Perhaps most notably, the court reiterated its support for traditional and customary rights 167 and asserted that the “State does not have the

158 Ho’ohan Aku, supra note 41, at 16.
159 Id. at 8.
160 See Beamer, supra note 139.
161 PASH, 79 Hawai‘i at 447, 903 P.2d at 1246.
162 Forman & Serrano, supra note 11, at 794 (citing Kalipi, 66 Haw. at 10, 656 P.2d at 750-51).
164 Forman & Serrano, supra note 11, at 794 (quoting Kalipi, 66 Haw. at 12, 656 P.2d at 751-52).
165 Id. at 793 (quoting Kalipi, 66 Haw. at 8-9, 656 P.2d at 750); see also PASH, 79 Hawai‘i 425 at 447, 903 P.2d at 1268.
166 HAW. CONST. art. XII § 7.
167 See Forman & Serrano, supra note 11, at 796; see also PASH, 79 Hawai‘i at
unfettered discretion to regulate the rights of ahupua’a tenants out of existence.” Even further, the legislative history of the 1978 Constitutional Convention that produced Article XII, Section 7 “emphasizes that” this constitutional protection “should not be ‘narrowly constructed or ignored by the court’.”

Ironically, even with distinct constitutional, statutory, and judicial intent to protect the traditional and customary rights of Native Hawaiians, there are very few safeguards in place to do so. The State and the court will point to the Ka Pa’akai framework, Cultural Impact Assessments, and various “potential legal handles,” but these fall short of adequately advocating for Native Hawaiian interests; especially when considering the two shortcomings above. As this article will explore, there are additional mechanisms by which these interests can be advanced and should be adopted to strengthen Hawai‘i’s legal framework protecting the wellbeing of Kānaka Maoli.

B. Kūkulu Hou: Building A New Framework to Protect Cultural Kīpuka through the Rule of Law

Regardless of the fact that law has changed the Native and may have created a being that is not entirely like his ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world.

425, 903 P.2d at 1246.

168 PASH, 79 Hawai‘i 425 at 451, 903 P.2d 1246 at 1272; see also Forman & Serrano, supra note 11, at 798; Ho’ohana Akua, supra note 41, at 15.


170 Ho’ohana Akua, supra note 41, at 21; Ka Pa’akai, 94 Hawai‘i 46-47, 7 P.3d at 1083-84.

171 Id. at 22; see also HAW. REV. STAT. § 343-2 (2005).

172 See id. at 31-57. (discussing various “legal handles” that are available to protect traditional and customary rights; like the Environmental Review Process under HRS § 343, the Land Use Commision under HRS § 205, County Land Use Decision-Making Authorities, The Board of Land and Natural Resources, and Litigation).

173 See infra Part IV.

Kānaka Maoli have continued to exist within a changing society and governmental structures; kānaka have continued to evolve. Regardless of the devastating perils of colonization, kānaka have continued to revive and adhere to the cultural ʻkipuka amongst a changing society. Moving towards a foreign system of governance does not mean one is less Hawaiian.

In forwarding this idea, Beamer posits, “native appropriation is possible. In fact, as an indigenous scholar in the contemporary world, I would have to say it has to be possible.” In the same vein, kānaka identities and the cultural ʻkipuka that inform them, can and must function alongside Western notions of property rights in order to uphold the State’s constitutional duty – it cannot be one or the other. Integral to the survival of the native individual’s human rights – and the traditional and customary rights that follow – the State and the courts must not only continue to defend vigorously and affirm these rights, but also to develop new ways by which the State can adhere to its constitutional duties.

The State’s commitment to protecting traditional and customary rights is enshrined in these landmark cases and most importantly Hawaiʻi’s unique legal regime. While courts have largely “provide[d] the ‘badly needed judicial guidance’” to Article XII, Section 7’s protections through the means available to them, State agencies have struggled with effectuating the intent of the constitutional and statutory protections. This is in large part due to the lack of guidance and mechanisms to interpret its duties under the legal regime. This portion of this article aims to build on these protections by drawing on examples that may provide the court with additional tools to construct safeguards against “regulating the[se] rights . . . out of existence.”

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175 See Beamer, supra note 139, at 13.

176 See Beamer, supra note 139, at 13.

177 Especially alongside the United States’ Constitutional “Takings Clause.” See U.S. CONST. amend. V, XIV.


179 HOʻOHANA AKU, supra note 41, at 58.


181 Forman & Serrano, supra note 11, at 798.
1. Protecting Cultural Kīpuka Behind Traditional and Customary Rights

The courts’ balance of interpreting the specific boundaries of custom has outlined principles like certainty,\textsuperscript{182} traditionality,\textsuperscript{183} and weighing kānaka interests.\textsuperscript{184} The latter consideration, which involves an inquiry into a unique, dynamic, and expansive cultural knowledge base, is also hard to quantify, legitimize, or qualify – even among Native Hawaiian themselves. Often times, these inquiries turn on different value systems and beliefs. Building protections by defining the practice itself may prove to be problematic. Without a solid definition of what “traditional and customary” practices are, the court is left with very few safeguards to prevent harm to Native Hawaiians, as well as, against “regulating the[se] rights . . . out of existence.”\textsuperscript{185}

C. New Zealand Approaches to Māori Cosmology

Indigenous views of their relationship with the natural world differ from those of the states within which they live. Such different views stem from different cosmologies and religions that define the appropriate place of humankind within nature. They give rise to the different understandings of human rights and responsibilities in relation to the natural world and what people can and cannot do with it. This difference goes to the heart of disputes between indigenous peoples and settler states over the use and occupation of land and natural resources.\textsuperscript{186}

Growing scholarship and advocacy around granting legal personhood to nature has begun to reframe the law that governs human interaction with nature. This paradigm shift speaks to the misalignment of beliefs that fuel environmental conflict like Mauna Kea. Granting nature such rights and guardianship may offer a useful tool to navigate the growing need to address these conflicts. For example, New Zealand’s incorporation of Māori cosmology has begun to shape laws around land and natural resources as having legal “personhood;” just as a human would have rights under the law.\textsuperscript{187}

\begin{itemize}
  \item \textsuperscript{182} \textit{PASH}, \textit{79 Hawai’i} 447, 903 P.2d at 1268 n.39; \textit{see also} Forman & Serrano, \textit{supra} note 11, at 788.
  \item \textsuperscript{183} \textit{Pele Defense Fund}, \textit{73 Haw.} 578 at 618-20, 837 P.2d 1247 at 1271-72; Forman & Serrano, \textit{supra} note 11, at 795.
  \item \textsuperscript{184} \textit{Ho’ohana Aku}, \textit{supra} note 41, at 16.
  \item \textsuperscript{185} Forman & Serrano, \textit{supra} note 11, at 798.
  \item \textsuperscript{186} \textit{Maori Cultural Rights}, \textit{supra} note 34, at 1.
  \item \textsuperscript{187} Granting legal rights to nature is a growing principle with international
\end{itemize}
Lecturer in law at Victoria University of Wellington, Catherine J. Iorns focuses on protecting the environment through “protecting the [Māori] cosmology” in her scholarship.188 Outlining examples from Aotearoa, Iorns highlights how Aotearoa has “upheld (minority) indigenous Māori cultural rights”189 and “illustrate[s] ways in which the law can be used to implement and incorporate indigenous cosmologies with a Western society.”190 Doing this, Iorns posits, is not only a tool to protect the environment, but also a means to recognize “indigenous rights” as “general human rights instruments.”191

Much like Kānaka, Māori interdependent and genealogical relationships with the natural world are seated in and preserved through cultural kīpuka.192 These kīpuka – for both Kānaka and Māori – host “spiritual or religious beliefs linking humans to their environment and venerating nature” and govern the way Māori operated within their world.193

After the Overthrow,194 Kānaka Maoli society transitioned away from subsistence lifestyles that were dependent on these genealogical relationships. For Māori, the “transition to the practice of agriculture and domestication of animals gave rise to changes in peoples’s constructions of nature.”195 The suppression of these relationships with and approaches to nature often “goes to the heart of disputes between indigenous peoples and applicability around protecting the environment. See, e.g., Bryant Rousseau, In New Zealand, Lands and Rivers Can Be People (Legally Speaking), N.Y. TIMES (July 13, 2016) https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html?r=0 [hereinafter Rousseau]; see also Anastasia Moloney, The Colombian Amazon now has the Same Rights as You, THE WORLD ECONOMIC FORUM (Apr. 10, 2018), https://www.weforum.org/agenda/2018/04/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case (highlighting the high court decision that required “government it must take urgent action to protect its Amazon rainforest and stem rising deforestation” and granting it “the same legal rights as a human being.”).

188 Maori Cultural Rights, supra note 34, at 1.
189 Id. at 275.
190 Id.
192 See Maori Cultural Rights, supra note 34, at 279; see also The KUMULIPO An Hawaiian Creation Myth. (Liliuokalani, trans., 1997).
193 Maori Cultural Rights, supra note 34, at 276.
194 Perhaps also through changes in the Kingdom Government as well.
195 Maori Cultural Rights, supra note 34, at 276.
As Iorns highlights, “[t]his clash of cosmologies – between seeing the natural world as a slave or as kin – has made it difficult for those who hold one view to understand the other.”

Unlike the settler society in relation to the Māori, however, the State has made concerted efforts to protect these very “spiritual or religious beliefs” within the rule of law. Yet, the effectiveness of these efforts is often seen as falling short by Kānaka Maoli.

There are a few ways in which Māori cosmology has been “incorporated or upheld in New Zealand law.” These mechanisms often start with court decisions and later include legislative incorporation, or “general law” and “negotiated grievance settlements.” Generally, all New Zealand law upholding Māori cosmology “stem from the Waitangi Tribunal (“Tribunal”) and its reports on the breaches of the Treaty of Waitangi.”

1. Waitangi Tribunal

For Māori, the Treaty of Waitangi - the “basis for . . . settlement” with the British Crown – has been the springboard to protecting Māori cosmologies in New Zealand law. While this treaty is “unable to be enforced directly in New Zealand courts,” these rights are enforceable when “enshrined in domestic legislation.” Asserted breaches of this treaty give rise to upholding Māori interests in New Zealand law.

Initially established in 1975, the Tribunal’s purpose was to “determine whether NZ government action breached the Treaty of Waitangi and to make recommendations for redress for any breaches.” The Tribunal’s make up accommodates members from both the Crown and Tribes, respectively. Together, the Tribunal “issues comprehensive reports on the interpretation of relevant treaty duties, on the surrounding facts” and addresses implicated Māori cosmology.

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196 Id. at 273.
197 Id. at 283.
198 Id. at 276.
199 See HAW. CONST. art. XII § 7; HAW. REV. STAT. § 1-1; HAW. REV. STAT. § 7-1.
200 Maori Cultural Rights, supra note 34, at 290.
201 Id.
202 Id.
203 Id. at 284.
204 Id. at 287.
205 Id. at 291 (citing Treaty of Waitangi Act 1978, s 6, subs 1 and 3 (N.Z.)).
206 Maori Cultural Rights, supra note 34, at 291.
207 Id. at 292.
notable one. The Tribunal’s regard for and integration of Māori cosmology requires that:

[E]very report into a historical land or resource claim includes a summary of the evidence about the claimants’ (ancestral) relationship with their traditional territories and natural resources. Their legends and the stories of their gods are recited and the maintenance of their connections with the natural world even after contact and confiscation is discussed. 208

The result of the Tribunal has “upheld equality of respect” not only for the treaty parties, but also, “Māori culture.” 209 The regard for Māori cosmology, or in Hawai‘i’s case, cultural kīpuka, is a part of the fundamental operation of the Tribunal. Here, Māori culture is a key consideration of governmental and tribal operations in New Zealand. This is a significant take away for Hawai‘i when considering the constitutional, statutory, and international declaration obligations to Kānaka Maoli. Central to this Tribunal is having a treaty and legislation upon which to stand. For kānaka, federal and state obligations outlined above can provide a similar foundation.

2. General Law

Branching out from the 1975 Waitangi Tribunal, New Zealand has also protected Māori’s rights through “general law.” 210 Building on the success of the Tribunal, the courts first “required the Māori spiritual relationship with the environment to be considered when making water management decisions.” 211 Later, this directive was broadened to include all legislation. In 1986, the “need to consider Māori culture and the principles of the Treaty of Waitangi was made a core part of the development of all legislation.” 212 Beyond the general requirement to incorporate “Māori culture and principles,” 213 various pieces of legislation specifically consider these principles to protect land and natural resources alongside distinct Māori relationships found in their cosmology. 214

208 Id.
209 Id.
210 Id. at 296.
211 Id.
212 Id.
213 Id.
214 See Maori Cultural Rights, supra note 34, at 296-306.
Iorns argues that “[t]he application of these provisions has directly resulted in the consideration, recognition and even protection of Māori cosmology in decisions . . . relating to the use, development, and protection of New Zealand’s natural and physical resources.”

3. Direct Negotiations and Settlements

The third mechanism that upholds Māori cosmology in New Zealand law includes direct negotiations and settlements. Such negotiations have included settlements that have impacts “New Zealand-wide, pan-Māori . . . as well as in respect of individual tribes, one at a time” in the form of “restor[ing] assets lost through treaty breaches” or acknowledging Māori relationships. Relevant to this article, negotiation settlements recognizing “tribual special relationships with the natural world” are most often done with individual tribes. These particular reparations normally include “an apology, the transfer of cash and assets, and non-financial cultural measures.”

Most recently, as an illustration of this mechanism, New Zealand has granted a sacred river legal personality as an “agreement between New Zealand’s government and Maori groups” as a repatriation measure. The purpose of the Te Urewera Act is to “establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values . . . .” Most notably, the law “now recognizes both the

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215 See id. at 298.

216 Id. at 306.


218 Maori Cultural Rights, supra note 34, at 306.

219 See id; see generally WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM.

220 Id.

221 Id.

222 Rousseau, supra note 187.


224 Te Urewera Act 2014, s 14 (N.Z.).

The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and
physical and metaphysical elements of rivers” and “allocates money and resources to its protection; including appointed legal guardians independent from the state – one for the crown and one for the iwi.”

4. Pilina: Binding Relationships

So, how can this model help to inform Hawai‘i’s constitutional and statutory protections on “traditional and customary rights?” New Zealand’s examples illustrate the use of “human rights law” to “better protect the cultural and religious rights of indigenous and tribal peoples” through general laws and statutes, court decisions, and settlements. These efforts also highlight Māori’s “right to have their special relationship with the natural world recognized and upheld in law.”

As such, recognizing kānaka cosmology presents a useful tool for the State to uphold its constitutional and statutory duties to Kānaka Maoli traditional and customary rights. On one hand, the State’s protection of kānaka cosmology could help to mitigate conflicts like Mauna Kea by legitimizing kānaka’s familial relationship with the mountain. On the other hand, the State could access and understand traditional storehouses of knowledge to facilitate the protection of existing ʻāina and resources. Providing real access to these cultural kīpuka can help to inform existing legal systems and administrative agencies. Doing this can help to define and expand the boundaries of custom in order to serve as a safeguard from “regulating rights out of existence.”

Beyond fulfilling an affirmative duty to protect traditional and customary rights, protecting Native Hawaiian cultural kīpuka through the

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for its national importance, and in particular to—

(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and

(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and

(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.

Id.

225 Professor Catherine Iorns, supra note 223.

226 See HAW. CONST. art. XII § 7; HAW. REV. STAT. § 1-1; HAW. REV. STAT. § 7-1.

227 See Maori Cultural Rights, supra note 34, at 298.

228 Id. at 275.

229 Forman & Serrano, supra note 11, at 797 (citing PASH, 79 Hawai‘i at 425, 903 P.2d 1246 at 1272).
rule of law can also provide a framework to better management of Hawai‘i’s finite land and resources.\(^{230}\)

IV. PROTECTING TRADITIONAL STOREHOUSES THROUGH THE RULE OF LAW

The rule of law can and should better accommodate Native Hawaiian cultural kīpuka by citing to, upholding, and integrating kānaka cosmology into laws.\(^{231}\) Using cultural kīpuka as a source to inform traditional and customary rights can aid the State in fulfilling its constitutional, statutory, and international declarational duties. Doing so will not only protect the ‘āina, but also advocate for indigenous human rights owed to Kānaka Maoli\(^{232}\) especially in light of historical injustices.\(^{233}\) Integrating cultural kīpuka can prove to be a mechanism to “restorative justice principles that underscore the importance of respecting Indigenous rights in partial redress for the harms of American colonialism.”\(^{234}\)

Taking steps to incorporate kānaka cosmology through legislation will also serve to close the gaps highlighted through judicial interpretation of Article XII, Section 7, Article XI, Section 1, HRS sections 1-1, and 7-1. In and around these duties, cultural kīpuka can serve as a valuable tool to Hawai‘i’s endeavors to protect its finite land and natural resources and to remedy global issues like climate change.

A. Cultural Kīpuka: A Paradigm Shift

To protect the storehouse of knowledge through the rule of law, this article first outlines general concepts that are useful in contributing to the necessary paradigm shift called for above. As the Federal and State Governments endeavor to uphold their constitutional, statutory, and international human rights-based duties to Native Hawaiian people, the themes below begin to set the foundation for the specific mechanisms that can be put in place to protect cultural kīpuka in the rule of law.

\(^{230}\) See Maori Cultural Rights, supra note 34, at 274.

\(^{231}\) Id.


\(^{233}\) See D. Kapua‘ala Sproat, Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities, 95 MARQUETT L. REV. 127, 145-47 (2011) (highlighting the Federal and State Governments’ commitment to reconciliation with Kānaka Maoli as a result of their involvement in the 1893 Overthrow of the Hawaiian Kingdom).

\(^{234}\) Id. at 145.
1. He Moku, He Kānaka: An Island and a Man – Valuing ‘Āina

Protecting cultural kīpuka in the rule of law starts by adjusting the way the law approaches environmental law protections as they interface with cultural kīpuka. The existing framework – and its limitations – all derive out of placing human’s rights at the center.235 While this is certainly an important endeavor, the limitations of this framework retracts from the very people it aims to protect. Various legislation aims to advocate for human rights.236 Other legislation aims to protect the environment.237 But neither statutory or constitutional provisions within Hawai’i’s framework explicitly incorporate the value of ‘āina and its relationship to people. As both Māori and Kānaka Maoli recognize, “‘these relationships are so crucial to Māori culture and identity that their survival cannot be separated from the survival of the culture itself.’”238 The law must begin to recognize the inseparability of ‘āina and native people.

Speaking to New Zealand’s upholding Māori cosmology in New Zealand law, Iorns highlights, “changes have been agreed to for human rights reasons, not for environmental reasons.”239 The approach, however, is better advanced by indigenous rights.240 This principle not only advocates environmental causes, but “also include[s] the maintenance of spiritual relationships with the natural world.”241 Indigenous rights, according to Iorns, intertwines human rights and indigenous relationships with land while also forwarding environmental rights and protections.242

For Hawai’i, this would mean expanding both environmental and traditional and customary practice laws to acknowledge the relationship that ‘āina and its resources have with its human counterpart. In New Zealand,

235 See Ho’OHANA AKU, supra note 41, at 785 (outlining the legal bases of traditional and customary rights (e.g., 1840 Constitution Preamble recognizing the peoples rights, 1850 Kuleana Act, etc.)).

236 See HAW. CONST. art. XII § 7 (amended 1978); see generally Forman & Serrano, supra note 11; Ho’OHANA AKU, supra note 41.

237 See HAW. CONST. art. XI, § 1.

238 Maori Cultural Rights, supra note 34, at 327 (citing Christopher Stone, Should Trees Have Standing?, 45 S. CAL. L. REV. 450, 500-01 (1972)); see also Silva & Kikiloi, supra note 8.

239 Maori Cultural Rights, supra note 34, at 326.

240 Id.

241 Id.

242 See id. at 236-27, 325 (emphasizing that “Te Urewera legislation shows that people are considered part of forest management” and that this legislation “truly reflects the indigenous cosmological view of people as a part of nature, not separate nor above it”).
breaches to the Treaty of Waitangi are “discussed in terms of the loss of relationships more than the loss of resource value.”

a. Mālama ʻĀina

In a notable decision discussing the State of Hawaiʻi’s “highest duty to preserve and maintain trust lands,” the court in Ching v. Board of Land and Natural Resources explained this duty in the context of mālama ʻāina. This “duty,” the court said, “is broadly coined in the concept of mālama ʻāina – to care for the land.” However, mālama ʻāina, should not just reference the literal translation of “take care of the land” when used in this context.

As one examines this idiom’s cultural context (cultural kīpuka), the kuleana, relationships, and worldviews that define this ideal are revealed. The idea of mālama ʻāina must be used in the way Kānaka Maoli have traditionally conceptualized it. Removing the practice from this context would fall short of the court’s decision that bases the idea off of the traditional practice the court aimed to protect in issuing its decision. Using the surrounding context of mālama ʻāina is, indeed, utilizing cultural kīpuka.

B. Specific Forms

For Hawaiʻi, integrating cultural kīpuka can come in a number of different forms. While each present a different avenue to addressing the short coming of Hawaiʻi’s legal regime, each is important and may be employed at the same time. For example, Hawaiʻi could create specific administrative agencies or bodies responsible for administering the State’s trust responsibilities. Before that, the State should adopt mechanisms – like a restorative justice framework – to effectuate the constitutional and statutory protections. Specific legislation can directly address the limitations outlined above. And finally, the State could pursue a constitutional amendment similar to the 1978 amendment. Ultimately, New Zealand’s example – while certainly dictated by its context – provides a model to protect Native Hawaiian rights and the environment.

1. Administrative Agency and Bodies

Using the Te Urewera Act as an example, the State may find that respecting and enshrining Kānaka Maoli worldviews can mitigate and guide

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243 Maori Cultural Rights, supra note 34, at 292.


245 Id.
potential conflicts where belief systems do not align. Having kānaka representation can also begin to mend the strained relationship between the state and Native Hawaiians; even providing them with additional tools to the right to self-determination.246

New Zealand’s creation of the Tribunal solely dedicates time and resources to ensuring that a single treaty is enforced for both the benefit of the Crown and Māori.247 Given that Hawai‘i’s courts have continually imposed duties upon the State, dedicating resources to ensuring compliance and evaluating grievances of breaches of those duties would certainly build capacity and awareness for Kānaka Maoli rights, not only in theory, but as they operate within a modern Hawai‘i.

Therefore, the State could devote or create an administrative board to ensure compliance, evaluate grievances, and issue recommendations to the State.248 While courts have begun to provide “badly needed judicial guidance” called for in the 1978 Constitutional Convention249 as they pertain to traditional and customary rights, the State cannot solely rely on judicial interpretation to fulfill these duties.

In the case of Mauna Kea, a tribunal-type mechanism would be beneficial for its ability to evaluate the cultural impact of the proposed telescope. Whereas a court of law is bound by the legal parameters in which the case exists, a tribunal could and should properly consider cultural implications to both kānaka and ‘āina.250 Moreover, the tribunal could issue recommendations to the adjudicating body.


247 See Maori Cultural Rights, supra note 34, at 292.

248 An argument could be made that the Office of Hawaiian Affairs -- also created by the 1978 Constitutional Convention -- is responsible for handling this kind of issue. While this may prove to be true, the State must consider actively engaging in and alongside the Administrative body that charged with taking on this task. The State and/or Board of Trustees may also need to develop parameters to ensure success of such an administrative body.

249 HO’OHANA AKU, supra note 41, at 59.

250 For more examples on the operation of a tribunal, see Iorns at 292-93 (highlighting that “In some reports, violations of Māori cosmology are considered breaches of the Treaty in their own right. For example, because water has its own spirit and life force, it needs to be carefully maintained so as not to diminish or lose that spirit. . . .Even if it might be in quantities which modern science saying will be diluted and dispersed and thus rendered clean when measured scientifically, the mixing of the two spirits – the unclean with the clean – diminishes the life force of clean, life-giving water. Thus, the discharge of a town’s sewage into an ancestral river is considered a breach of the tribe’s cultural relationship with the river and thus of the Crown’s duties to protect Maori interests under the treaty.”).
Should the State undertake the creation of an administrative body as a mechanism to protecting cultural kīpuka, the State must pay special attention to the formation of such a body. In New Zealand, essential to the Tribunal’s success is the composition of its members; “approximately half of the Tribunal members are Māori and the members’ backgrounds range widely, including different professional groups as well as political views.”\textsuperscript{251} The State must work closely to identify individuals well-respected by the community they aim to serve. Most importantly, the advantage of a tribunal – or similar body – is that Native Hawaiian cultural claims are evaluated by subject matter experts; in many cases, practitioners. Representation of Kānaka Maoli in the tribunal will be key to its success – both practically and theoretically.

2. Specific Legislation

The kuleana\textsuperscript{252} to traditional and customary rights are far-reaching, broad, and undefined; that kuleana arguably touches all subject matter areas within the State and Legislature’s purview. As such, if the State and its administrative branches are to effectively fulfill its affirmative duty\textsuperscript{253} to protect traditional and customary rights, it follows that they should consider the impact of their decisions on the culture and cosmology it aims to protect. Just as New Zealand considers Māori cosmology, the State could issue a broad mandate to consider Native Hawaiian cultural kīpuka as “a core part of the development of all legislation.”\textsuperscript{254}

As a specific piece of legislation, the State could endeavor to enshrine the cosmology of the people whose rights it is tasked with protecting.\textsuperscript{255} For example, legislators could pass a resolution that acknowledges and honors the cosmological stories of Kānaka Maoli. One such story is the Kumulipo, a koʻihonua.\textsuperscript{256} Here, “the KUMULIPO articulates and reveals the connections of the sky and earth, the ocean and land, the land and man, the man and gods and returns again to repeat the cycle with the sky and earth, who are gods. The Kumulipo recognized that

\textsuperscript{251} Maori Cultural Rights, supra note 34, at 291, n.88.

\textsuperscript{252} Pukui & Elbert, supra note 1, at 179 (defining kuleana as “right, privilege, concern, responsibility, ownership, etc.”).

\textsuperscript{253} See Forman & Serrano, supra note 11, at 804 (quoting Ka Paʻakai, 94 Hawai`i at 36, 7 P.3d at 1082).

\textsuperscript{254} Maori Cultural Rights, supra note 34, at 296.

\textsuperscript{255} See Forman & Serrano, supra note 11, at 804 (quoting Ka Paʻakai, 94 Hawai`i at 36, 7 P.3d at 1082).

\textsuperscript{256} A koʻihonua is a genealogical chant. The Kumulipo, in particular, proclaims the birth of all living things in honor of chief Kalaininuiamamo. See The KUMULIPO An Hawaiian Creation Myth. (Liliuokalani, trans., Pueo Press, pub., 1997).
the interrelationship of all things is an everlasting continuum.”257 Doing so would uphold Kānaka Maoli “genealogy connecting mankind to earth and sky”258 through a cultural kīpuka that “echoed the complexities and details of the Hawaiian thought process.”259

Additionally, this legislation could identify specific measures or mandates that required any governmental action implicating any part of this cosmology to consult with Kānaka Maoli or a particular administrative agency (if created). Ultimately, this legislation would codify Kānaka Maoli cultural kīpuka and provide a mechanism for redress and enforcement.

In the case of Mauna Kea, the court in Mauna Kea Anaina Hou v. Board of Land and Natural Resources considered “whether the procedure followed by the Board of Land and Natural Resources (“Board” or “BLNR”) in issuing a permit to construct an observatory in a conservation district comported with due process.”260 In its analysis, the court was only able to consider the issue of due process as fulfilled by the BLNR’s “adjudicatory proceeding”261 and whether “[a]ppellants were given an opportunity to be heard at a meaningful time and in a meaningful manner.”262 While the court acknowledges the Appellant’s evidence of “substantial adverse impacts,” on Mauna Kea, the court could only consider the procedure of the BLNR’s issuance of the permit.263 Kānaka Maoli also raised concerns over conflict of interest against the Hearings Officer in subsequent hearings.264

As a practical matter, Native Hawaiian rights under statutory and constitutional provisions boasted of in theory, held little weight for a place that Kānaka Maoli believed to be of heightened spiritual significance.265 To

257 Id.
258 Id.
259 Id.
260 Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai‘i 376 at 228, 363 P.3d 224 at 379 (Haw. 2015).
261 Id. at 237.
262 Id.
263 Mauna Kea Anaina Hou, 135 Haw. at 235, 363 P.3d at 386. Consider also the Appellee’s evidence highlighting the “cumulative impact” of TMT in “light of existing telescopes on Mauna Kea” only adding “a limited increment to the level of cumulative impact…but will not tip the balance of any assessed impact from a level that is currently less than significant to a significant level.” Id. at 135 Haw. 233-34, P.3d at 385-86.
265 See Kepa & Maly, supra note 18 (noting the cultural significance of Mauna Kea:}
reconcile this shortfall, specific legislation may also come in the form of codifying a framework to consider the substantive implications on traditional and customary rights in any case; regardless of the issue before the court.

A possible tribunal might be relevant for its ability to consider the implications on cultural kīpuka and Kānaka Maoli and to issue recommendations for the adjudicating body. For instance, whenever traditional and customary rights were implicated in any proceeding, this would trigger review of Kānaka Maoli claims and asserted rights by referencing cultural kīpuka.

In advocating for “Wai through Kānāwai: Water for Hawaiʻi’s Streams and Justice for Hawaiian Communities,”266 Professor D. Kapuaʻala Sproat outlines a “contextual-analysis”267 framework that would “address a wide range of legal controversies involving Native Peoples’ environmental values and claims.”268 Beyond this, I believe that this framework could also address controversies that implicate Native Hawaiian rights. The framework considers: “(1) cultural integrity; (2) lands and other natural resources; (3) social welfare and development; and (4) self-government.”269 This framework, if codified through legislation – or adopted through case law – could promote equality and fairness for Kānaka Maoli rights and cultural kīpuka.

3. Constitutional Amendment

The last mechanism this article proposes could possibly endeavor to encompass all or some of the themes and mechanisms highlighted above. A constitutional amendment, while admittedly a large undertaking and

We have found, that as is the case in all areas of Hawaiian life, the traditions, customs and practices associated with the ʻōihana kilokilo (astronomy) and kilo hōkū (observing and discerning the nature of the stars) were deeply tied to the spiritual beliefs of the Hawaiian people. The stars are physical manifestations of the gods who created the heavens, earth, and humankind, or are body-forms granted to select individuals or beings of nature (Malo, 1951 and Beckwith, 1951). The combined writings of native and foreign historians on this subject—recorded between the 1830s to 1935—provide us with a list of more than 270 Hawaiian names for stars (not including alignments of stars which marked the heavens and pathways of traditional navigators);

See also Mauna Kea Anaaina Hou, 135 Hawai‘i at 245, 363 P.3d at 237 (discussing Native Hawaiian accounts of ancestral and familial ties to the land itself).

266 Sproat, supra note 221, at 127. [hereinafter Sproat].
267 Id. at 137.
268 Id. at 138.
269 Id. at 137. This framework also begins to “synthesize[e] international human rights notions of self-determination for formerly colonized peoples.”
requiring mass buy-in, may be necessary to implement the changes highlighted in the framework above. The court, forty years after Article XII, Section 7 was adopted, may indicate that the current provision is not adequate to protect its purpose debated by the delegates of the constitutional convention.

Should the people of Hawai‘i decide to have another constitutional convention, the issue(s) pertaining to Native Hawaiian rights would seem like a likely subject to consider. This option, while promising sweeping change and stronger mandates, may also open the door to opponents who believe these rights should be rolled back. Further, the legislature could undertake the process of a public vote; giving rise to concerns about Native Hawaiians as a minority in Hawai‘i and highlighting the political capital necessary to effectuate a constitutional amendment.

C. Caveats to Consider

1. Serving State Interests

This article begins to illustrate the benefits of integrating cultural kīpuka in the rule of law for Kānaka Maoli and for the State of Hawai‘i. But what incentive would the State Government have for undertaking the ideals discussed above? How could the integration of cultural kīpuka benefit the larger Hawai‘i, besides Kānaka Maoli interests?

For the State, cultural kīpuka can aid the State in fulfilling its duties to the Native Hawaiian people. But in 21st century Hawai‘i, there are, admittedly, other interests that the State must also accommodate. While this article advocates for cultural kīpuka for the benefit of Kānaka Maoli and the State, implementing measures outlined here can also benefit the broader Hawai‘i population as well as broader State interests.

Necessary efforts for sustainability and curbing climate change continue to grow at the local, national, and international level. One such example of these efforts includes Hawaiʻi’s “Clean Energy Initiative.” The State of Hawai‘i, in acknowledging its dependence on fossil fuels, aims to be the “first nation to achieve 100% clean energy.” While the State’s plan includes concrete objectives to obtaining this goal, Kānaka Maoli notions of mālama ʻāina and resource management could be integral to these efforts. On one hand, the State could access cultural kīpuka (stories, songs, and moon phases, etc.) as a guide to responsible resource management. On the other hand, the State could use cultural kīpuka (wa’a navigation, hula, etc.) to promote such ideals.

270 See Forman & Serrano, supra note 11, at 798 (highlighting that the State cannot “regulate the[se] rights . . . out of existence.”).

Take Hōkūleʻa’s recent success on its world-wide voyage: what was once an integral practice, subsequently lost, and ultimately revived became a beacon of a “sustainable future” for the world.272 As one begins integrating Native Hawaiian cultural kīpuka through the rule of law, one finds an inherent worldview promoting sustainability. Cultural kīpuka are increasingly available to provide a framework to better management of Hawaiʻi’s finite land and resources.273

Turning now to Kānaka Maoli, developing the framework that advances Native Hawaiian interests begins to seek redress for decades of settler-colonialism.274 The relationship between Kānaka Maoli and settler governments has predominantly been poor; regardless of governmental attempts to “empower” Native Hawaiians.275

Issues like Mauna Kea are particularly disheartening and infuriating. After a physical stand-off on the mountain, Kānaka Maoli engaged the judicial and executive systems, hoping their interests would prevail. As explored above, the court was unable to do so given circumstances of the case involving Western concepts of property. Instances such as this contributes to Kānaka Maoli distrust and disengagement with the Governments tasked with serving them. Despite attempts by the State and Federal Governments to address the concerns of Kānaka Maoli, their relationship with Kānaka Maoli have largely been negative:

Hawaiians in modern times also have found little real justice through legal processes. Continuing disputes over monies due under State law for Native Hawaiian programs,12 the dismal track-record of the Hawaiian Homes program established by a 1921 Congressional Act to provide Hawaiians with lands, and ongoing clashes between Hawaiians and private landowners seeking to prohibit access to traditional cultural sites and gathering rights have only reinforced the view that the law cannot be trusted . . .276


273 See Maori Cultural Rights, supra note 34, at 274.


While this historical disillusionment has continued, taking proactive steps to advance Kānaka Maoli interests would be a noble attempt to improve relations with Kānaka Maoli.

2. Equal Protection Challenges

As with any attempts to accommodate Native Hawaiian interests, incorporating cultural kīpuka in the rule of law may give rise to first amendment and equal protection issues. This qualifier is briefly recognized here to highlight its existence, caution any efforts, and to acknowledge that it goes beyond the scope of this article. Regardless, it should be considered if the State and/or Federal Government choose to pursue any one of the proposed mechanisms above. This delicate balance, however, may be effectively addressed by acknowledging the Federal Government’s “special political and trust relationship” established by Congress.

V. Conclusion

[1]ndigenous rights offer a more fundamental challenge to the mainstream culture with a vastly different view of humans’ relationships with the natural world and thus perhaps a greater opportunity for meaningful change. As Maori recognize, “these relationships are so crucial to Maori culture and identity that their survival cannot be separated from the survival of the culture itself.” Perhaps such recognition in law will help encourage us all to realize that these relationships with the natural world are actually crucial to every person’s and people’s identity and survival.

While this article advocates for Native Hawaiian rights as it intersects with State and Federal Governments, Iorns reminds us that this concept may in fact transcend both of these incentives. The tools and insight

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277 See id.


280 Maori Cultural Rights, *supra* note 34, at 327 (emphasis added).
afforded through Native Hawaiian cultural kīpuka are perhaps but one means of protecting the larger collective humanity and our relationship with the natural world we inhabit.

In furtherance of this effort, this article examined the existing legal framework in Hawai‘i to assert ways in which traditional notions of cultural kīpuka can be upheld through the rule of law. It began by outlining the various statutory and constitutional duties imposed on the State and the court’s interpretations of these duties. Furthermore, the growing attention to indigenous rights at the international level, which recognizes and advances Native Hawaiian rights as fundamental rights for indigenous peoples.

It continued by highlighting problematic areas still in need of protection; namely being “traditionally exercised in this manner,” balancing the inequal interests and harms, and lack of mechanisms that prevent these rights from being “regulated out of existence.”

Integrating cultural kīpuka in the rule of law not only aims to protect ‘āina (land and its resources), but also Kānaka Maoli cultural relationships integral to the health of the native individual. Considering the limitations of the existing framework, this article then advocated for additional protections and the ways in which they can be implemented; proposing specific ideals of ‘āina. It then proposed specific mechanisms such as the creation of an administrative body like the Tribunal, specific and/or general legislation requiring the consideration of cultural kīpuka, and finally, an additional constitutional amendment stronger than Article XII, Section 7.

New Zealand’s examples of upholding Māori cosmology in the rule of law provided concrete examples for Hawai‘i; illustrating the success of its mechanisms for the government, Māori tribes, and larger New Zealand community. Iorns’ work also asserts the usefulness of indigenous rights as it is able to advocate for human rights, cultural rights, while also – and importantly – benefitting the environment. Finally, highlighting specific caveats like incorporating broader State interests and

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283 See Pele Defense Fund, 73 Haw. 578 at 620, 837 P.2d 1247 at 1272; Forman & Serrano, supra note 11, at 796, 795.

284 See Kalipi, 66 Haw. at 10, 656 P.2d at 750-51.

285 PASH, 903 P.2d at 1272; see also Forman & Serrano, supra note 11, at 798; Ho‘ohana Aku, supra note 41, at 15.
considering equal protection challenges, the limitations of this article are revealed. Admittedly, this portion also reveals the potential for additional scholarship on the topic.

In 2018, we continue to witness the creation of new land on Hawai‘i island.\textsuperscript{286} Perhaps this new land will one day be ‘āina — with human inhabitants fostering relationships on and with it. Kānaka Maoli can surmise what this relationship will look like by citing to and accessing cultural kīpuka; even when its source is found in 19th century scholarship.\textsuperscript{287} The advantages of such sources prove its growing relevance in the face of modern-day challenges; whether they be disagreements of land stewardship, resource allocation, or governance. Ultimately, this article posits just that: that the protection and integration of Kānaka Maoli cultural kīpuka are not only beneficial to protecting Native Hawaiian traditional and customary rights, but also to Hawai‘i’s ‘āina and people, alike.


\textsuperscript{287} See Malo, \textit{supra} note 3, at 36-37.