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## THE USE OF CUSTOMARY LAW TO PROTECT THE CULTURAL PRACTICES OF INDIGENOUS PEOPLES IN HAWAI'I

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### I. Custom In Anglo-American Jurisprudence

The origin of contemporary judicial understanding in the United States of the law of custom is generally traced to *Sir William Blackstone's Commentaries on the Law of England* (1765). Several state courts, most notably Oregon and Hawai'i in recent years have used the doctrine to define public access to beaches and native gathering rights, respectively.<sup>1</sup>

To date, the United States Supreme Court has declined to review whether state court decisions using the doctrine of custom fail to comport with the takings requirements of the Fifth and Fourteenth Amendments to the constitution of the United States.

This article reviews the case law treatment of issues posed by judicial use or litigants invocation of principles of customary law as potential model to apply to protect the cultural practices of indigenous peoples.

### II. Custom And Beach Access In Oregon

In *State ex rel. Thornton v. Hay*,<sup>2</sup> the Oregon Supreme Court applied custom to find a recreational public easement in beach property where the owners of a tourist facility appealed a decree enjoining them from

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<sup>1</sup>See generally David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings," (1996) 96 *Colum L Rev* 1375.

<sup>2</sup>462 P2d 671, 672 (1969).

constructing fences or other improvements in the dry-sand area between the sixteen-foot elevation contour line and the ordinary high-tide line. Although neither party asserted it, the court affirmed the decree based on custom:

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood.<sup>3</sup>

The court reasoned that the "most cogent basis for the decision in this case is the English doctrine of custom" because it could be proven with reference to a larger region due to the unique nature of the beach and thus the doctrine would prevent clogging the courts with "tract by tract litigation."<sup>4</sup> It adopted *Blackstone's* formulation and analyzed seven "requisites" to test for custom. The seven are:

1. Antiquity;
2. Exercised without interruption;
3. Peaceable and free from dispute;
4. Reasonable;
5. Certainty;
6. Obligatory; and
7. Not repugnant or inconsistent with other customs or other laws.<sup>5</sup>

The court rejected the argument that the custom in issue was unprecedented and lacked antiquity. Instead, it cited New Hampshire precedent to support its opinion, and the observation that European settlers were not the first to use the dry-sand area as public land to conclude:

[T]he custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that

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<sup>3</sup>*Ibid* 673.

<sup>4</sup>*Ibid* 676.

<sup>5</sup>*Ibid* 677 (paraphrasing 1 Blackstone, Commentaries 75-78).

notice of the custom on the part of persons buying land along the shore must be presumed.<sup>6</sup>

In *McDonald v. Halvorson*,<sup>7</sup> the Oregon Supreme Court stated that it reaffirmed the *Thornton* decision, but held that the rule in *Thornton* did not extend to an estuary separated from the ocean by a basalt sill. *McDonald* arose out of a dispute between adjacent property owners over access to a beach surrounding a mixed salt/fresh water estuary. Identifying the issue as a matter of public concern, the state intervened and asserted a public right to use the "dry-sand area" based on *Thornton*.<sup>8</sup> The court determined that the custom in *Thornton* applied only to the dry-sand area adjacent to the Pacific Ocean and, thus, did not apply to the area before the court.<sup>9</sup>

In *Stevens v. City of Cannon Beach*,<sup>10</sup> the Oregon Supreme Court affirmed the denial of a building permit for construction of a seawall on the dry-sand portion of plaintiffs' property. Plaintiffs filed an inverse condemnation action against the city alleging that the denial of the building permit was an unconstitutional taking of property without just compensation and a denial of due process of law.

The court held that when plaintiffs took title, they were on notice that the dry-sand area was encumbered by a public use easement originating from customary use.<sup>11</sup> Consequently, plaintiffs never had the property interests they claimed were taken by the denial of the building permit.<sup>12</sup> Quoting the United States Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*,<sup>13</sup> the court stated:

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<sup>6</sup>*Ibid* 678.

<sup>7</sup>780 P.2d 714 (Or. 1989).

<sup>8</sup>*Ibid* 722.

<sup>9</sup>*Ibid* 722-23.

<sup>10</sup>854 P.2d 449 (Or. 1993) cert. denied 114 S Ct 1332 (1994).

<sup>11</sup>*Ibid*. 456 (citing *Thornton*).

<sup>12</sup>*Ibid*.

<sup>13</sup>1505 US 1003 (1992).

Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.<sup>14</sup>

In affirming dismissal, the court in *Stevens* held that the doctrine of custom was a background principle of Oregon law.

Plaintiffs asked the United States Supreme Court to review the decision of the Oregon supreme court. Justice Scalia, joined by Justice O'Connor, dissented from the denial of review by the Supreme Court: '[T]o say that this case raises a serious Fifth Amendment takings issue is an understatement'.<sup>15</sup> Noting the lack of a factual record in *Thornton* and *Stevens* (the doctrine of custom was raised at the state supreme court level in *Thornton* while *Stevens* was decided on a motion to dismiss), Justice Scalia questioned whether the doctrine of custom was applied correctly in *Thornton* by applying the law of custom to the entire Oregon coast.<sup>16</sup> He viewed Blackstone as requiring that custom affect "inhabitants of particular districts."<sup>17</sup>

The law of custom has not been applied to real property in a context outside of beach access or development in Oregon, Hawai'i courts, however, have relied on Oregon case law to protect traditional and customary rights of indigenous peoples in Hawai'i.

### III. The Protection Of The Traditional And Customary Rights Of Indigenous Peoples: Hawai'i's Customary, Constitutional, And Statutory Framework

In *Kalipi v. Hawaiian Trust Co., Ltd.*,<sup>18</sup> Kalipi claimed a right to enter undeveloped lands to gather natural products required for certain tra-

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<sup>14</sup>*Supra* n 10 at 456 (quoting *Lucas*, 505 US at 1029) (emphasis added by the Oregon court).

<sup>15</sup>*Stevens v City of Cannon Beach*, 114 S Ct 1332 (1994) (*certiorari*).

<sup>16</sup>*Ibid* at n 5.

<sup>17</sup>*Ibid* (citing 1 W. Blackstone, Commentaries \*74).

<sup>18</sup>66 Haw 1, 656 P.2d 745 (1982).

ditional native Hawaiian practices. Kalipi sought to exercise traditional native Hawaiian gathering rights in the ahupua'a of Ohia and Manawai on the island of Moloka'i. *Id.* An ahupua'a is an ancient Hawaiian division of land generally running from the sea to the mountains which enabled a chief and his peoples to obtain a variety of subsistence resources.<sup>19</sup> The Hawai'i supreme court ruled that Kalipi's failure to live in the land division in which he claimed these rights necessitated the affirming of the trial court's judgment for defendants.<sup>20</sup> Nevertheless the court recognized that such rights were preserved to a limited extent by statute, custom, and constitution in Hawaii.

The right to exclude others is generally held as one of the foremost principles of private property ownership.<sup>21</sup> The court examined and discussed three primary sources of law for the proposition that native Hawaiian gathering rights may supercede the 'exclusivity traditionally associated with fee simple ownership of land.'<sup>22</sup> The court stated "[A]ny argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail."<sup>23</sup>

The three sources of law referred to by the court are the *Hawai'i State Constitution* article XII, § 7, *Hawai'i Revised Statutes* § 7-1, and *Hawai'i Revised Statutes* § 1-1, which read, respectively:

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 such rights.

<sup>19</sup>*Ibid* at 6, 656 P.2d at 748 (citing *Palama v Sheehan*, 50 Haw 298, 440 P2d 95 (1968)).

<sup>20</sup>*Ibid* at 3, 656 P2d at 747.

<sup>21</sup>See, e.g., *Restatement of the Law of Property* § 7 (1936); *Kaiser Aetna v United States*, 444 US 164, 176, 179 (1979) ('The right to exclude is one of 'the most essential sticks in the bundle of rights that are commonly characterized as property. . .' and is 'universally held to be a fundamental element of the property right.').

<sup>22</sup>*Supra* n 18 at 4, 656 P2d at 748.

<sup>23</sup>*Ibid.*

*Haw. Const. art. XII, § 7.*

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

*Hawai'i Revised Statutes § 7-1.*

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

*Hawai'i Revised Statutes § 1-1.*

With *Haw. Const.* article XII, § 7 as the constitutional basis for preserving and enforcing traditional rights, the court in *Kalipi* applied Hawai'i Revised Statutes § 7-1 and § 1-1.<sup>24</sup> With respect to traditional gathering rights, the court's analysis of *Hawai'i Revised Statutes* § 7-1 concluded that its purpose was "to insure that commoners would be able to exercise those rights in connection with their tenancy in order to ensure the utilization and development of their lands".<sup>25</sup> The court claimed to balance the historical intent of *Hawai'i Revised Statutes* § 7-1 and modern realities by concluding that persons residing in an ahupua'a, in practicing native Hawaiian customs and traditions, may enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute.<sup>26</sup>

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<sup>24</sup>*Supra* n 18 at 5, 656 P.2d at 748.

<sup>25</sup>*Ibid.*

<sup>26</sup>*Ibid.*

The court also examined *Hawai'i Revised Statutes* § 1-1 as an additional basis for the assertion of customary gathering rights akin to the doctrine of custom.<sup>27</sup> The court held that "the Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others."<sup>28</sup> In other words, *Hawai'i Revised Statutes* § 1-1 may establish customary rights beyond those recognized in *Hawai'i Revised Statutes* § 7-1, "[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case."<sup>29</sup>

The Hawai'i supreme court next addressed customary rights in *Pele Defense Fund v. Paty*.<sup>30</sup> *Pele* involved, inter alia, access to undeveloped lands for the exercise by native Hawaiians of traditional subsistence, cultural, and religious purposes. Basing their claims on article XII, § 7 and *Hawai'i Revised Statutes* § 1-1, plaintiffs argued that the lands in question historically served as a common gathering area for those in an abutting ahupua'a. After reviewing the notes of the committee which drafted article XII, § 7, the court held that "native Hawaiian rights may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised."<sup>31</sup> In so doing, the court in *Pele* broadened the customary gathering and subsistence rights announced in *Kalipi*.

The decisions in *Kalipi* and *Pele* paved the way for *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n* (hereinafter "PASH").<sup>32</sup> Plaintiffs, an unincorporated public interest group, chal-

<sup>27</sup>*Supra* n 18 at 10, 656 P.2d at 751 (citing 1 W. Blackstone, Commentaries \*74 and State *ex rel. Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969)).

<sup>28</sup>*Supra* n 18 at 12, 656 P2d at 751-52.

<sup>29</sup>*Ibid.*

<sup>30</sup>73 Haw 578, 837 P2d 1247 (1992), *cert. denied*, 507 US 918, 113 S.Ct. 1277, 122 LEd2d 671 (1993).

<sup>31</sup>*Ibid* 620, 837 P.2d at 1272; *But see* Daniel G. Mueller, *The Reassertion of Native Hawaiian Gathering Rights Within The Context of Hawai'i's Western System of Land Tenure*, 17 U. Haw. L. Rev. 165, 189 (1995) (Asserting that the *Pele* court incorrectly relied upon article XII, § 7 for the proposition that gathering rights may accrue to other than ahupua'a residents).

<sup>32</sup>79 Haw 425, 903 P2d 1246 (1995), *cert. denied* \_\_\_\_\_ U.S. \_\_\_\_\_, 116 SCt 1559, 134 L.Ed.2d 660 (1996) (hereinafter "PASH").

lenged an administrative denial of standing to participate in a contested case hearing on the issuance of a special management area use permit. In reversing the lower court and granting standing, the court applied customary rights under Hawai'i law.

The court explained that under *Pele* the "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of [Hawai'i]." The court concluded that the Anglo-American concept of exclusivity was not universally applicable.<sup>33</sup> Strikingly, the court stated: "Customary and traditional rights. . . flow from native Hawaiians' pre-existing sovereignty."<sup>34</sup>

The court held that article XII, § 7 formed a sufficient basis for the State of Hawai'i "to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed."<sup>35</sup> This authority, however, is limited:

[L]egitimate customary and traditional practices must be protected to the extent feasible in accordance with article XII, section 7. . . . Although access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence.

Thus, to the extent feasible, we hold that the [Hawai'i County Planning Commission] must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.<sup>36</sup>

The court explicitly declined to express an opinion as to the meaning of "undeveloped" and "fully developed" lands leaving its holding somewhat ambiguous.<sup>37</sup>

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<sup>33</sup>*Ibid* 447, 903 P2d at 1268 (citing *Stevens v. City of Cannon Beach*).

<sup>34</sup>*Ibid* 449, 903 P2d at 1270.

<sup>35</sup>*Ibid* 451, 903 P2d at 1272.

<sup>36</sup>*Ibid* (emphasis in original).

<sup>37</sup>*Ibid* 450, 903 P2d at 1271.



In a petition for a writ of certiorari to the United States Supreme Court, it was argued that the court's decision was a retroactive enlargement of native Hawaiian customary gathering rights which violated due process and that the imposition of an expanded native Hawaiian gathering servitude subjected private property to a physical occupation compensable under the Takings Clause.<sup>38</sup> The Supreme Court denied the writ without comment.

Unlike Oregon, customary law in Hawai'i derives support from the state's constitution and statutes. Like Oregon, customary law in Hawai'i has withstood federal constitutional due process and takings challenges. Hawai'i's constitutional and statutory protection of traditional and customary rights of native Hawaiians exercised for subsistence, cultural, and religious purposes provides an example of a balance struck between the historical practices of indigenous peoples and modern property rights and development demands. The Hawai'i Supreme Court has made clear its view that 'undue reliance [should not be placed] on western understandings of property law [because they] are not universally applicable in Hawai'i.'<sup>39</sup> Hawai'i's case law demonstrates that the doctrine of custom can be used within Anglo-American law as a basis for the protection of the traditional customs and practices of indigenous peoples.

#### **IV. The Future Evolving Of Customary Law Into International Law: Draft United Nations Declaration On The Rights Of Indigenous Peoples**

It is useful to note that several international agreements exist for the general protection of human rights.<sup>40</sup> The agreements, however, do not address the specific needs of indigenous peoples. As one commentator explains:

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<sup>38</sup>See Petitioner's Writ of Certiorari at 12, 23.

<sup>39</sup>*Supra* n 32 at 451, 903 P2d at 1272.

<sup>40</sup>See generally, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 UNTS 3.

Through the international human rights program, indigenous peoples and their supporters have been successful in moving states and other relevant actors to an ever closer accommodation of their demands. The traditional doctrine of state sovereignty, with its corollaries of territorial integrity, exclusive jurisdiction and non-intervention in domestic affairs, has hobbled the capacity of the international legal order to affirm indigenous peoples' rights and to limit accordingly the action of states within their asserted spheres of control.<sup>41</sup>

Recognizing that these agreements did not specifically address the rights of indigenous peoples, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted in 1994 a draft United Nations Declaration on the Rights of Indigenous Peoples and submitted it to the Commission on Human Rights for further action (hereinafter "Draft Declaration").<sup>42</sup> In focusing on indigenous peoples, the Draft Declaration represents the recognition of an additional dimension in international human rights.<sup>43</sup> As the preamble reads:

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.<sup>44</sup>

Since customary law is largely unwritten, the Draft Declaration represents, in part, an attempt to reach an international codification of customary rights. Part VI addresses the issue of territorial rights under Article 26:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources

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<sup>41</sup>S. James Anaya, "Indigenous Rights Norms in Contemporary International Law," (1991) 8 *Ariz J Int'l & Comp L.* 1, 5.

<sup>42</sup>Draft United Nations Declaration on the Rights of Indigenous Peoples, Aug. 16, 1994, 34 *ILM* 541.

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid* 547.

which they have *traditionally owned or otherwise occupied or used*. This includes the right to the full recognition of their laws, *traditions and customs*, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.<sup>45</sup>

Although the Draft Declaration has not been ratified by the U.N. General Assembly, it is a useful model for national attempts to protect and enhance the customary rights of indigenous peoples.

C. Michael Hare\*

\* Cades Schutte Fleming & Wright  
Attorneys at Law  
Honolulu, Hawaii

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<sup>45</sup>*Ibid* 552 (emphasis added).

