

INVISIBLE LAW, VISIBLE

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I am invisible, understand, simply because people refuse to see me.

—Ralph Ellison, *The Invisible Man*

Are rights once established and exercised, then inalienable? Does belligerent force of foreign nations alone disenfranchise Original Peoples¹ of those rights? And can those rights be viewed differently because the people in question were classified extra-territorially as flora and fauna or Non-Christians? We have new understandings today, and yet, the foundation of western law in the lands claimed by “discovery” still asserts exclusive interest based on violent enforcement of a race-based European doctrine.

Perhaps we can take a new look at limits put upon Original Peoples by western law and how it was applied to Original Peoples in the past. We must take into account, how law was used in the age of “Discovery” to subdue the Original Peoples who inhabited the presumably “New World”. This article reviews the extra-territorial legal schematic meant to replace “savage” law by Anglo-Europeans and exercised as a Christian right to do so. I put forward that the absence of recognition of Original Nations’ own legal precedence at the point of first contact must be considered in contemporary judicial review processes; that there is a necessity to apply those practices in international law and on the

1 I have used the term “Original Peoples” instead of other common terms “Indigenous,” “Native” and “Aboriginal” Peoples because they have specific meanings in English that in practical terms limit rights. This initiative hopes to expand Original rights and to construe legal and political understandings to benefit so-called *Indigenous* Peoples. In an effort to be inclusive and not exclusive, or allow nations that practice empire to define Original People according to their own interests, I use Original to define those humans who continue to own the deciding interest in the lands in their home countries.

ground from where those rights spring. I argue for a new approach for accessing those inherent rights of Original nations by strengthening their own institutions and suggest an international basis to create legitimate standing for their own court of remedy.

Come on a journey with me; put aside prejudices that *Original Peoples* have had to contend with from other cultures, and strip away the layers of descriptions projected upon Original Peoples, and especially those self-descriptions misapplied to their own identities, communities and fundamental understandings of their arrival in this “distant land of laws,” known by its foreign control. Ask yourselves about the “Fundamental” law that governs how we have all come to understand our “rights.” What governs the responsibilities we have to each other, our environment and our inherent right to continue our traditions that has preserved peoples for thousands of years? This is not a debate between imperialism and its colonial practices; rather it is a debate between *free minds* and *colonized minds*. Original Peoples have lived under the assumption that their prison door is forever locked, I challenge that status by declaring that Original Peoples have the key to open the prison door which separates them from their traditional laws, rights, and freedom.

Where do Original Peoples go to fix what is wrong with their communities? Why do they found themselves alienated from their own lands and environment? To whom do they turn? The courts, laid out for Original Peoples and explained to them as “impartial,” have been anything but balance in their rulings. Why did Original Peoples find themselves mischaracterized as “backwards”?² Who constructed these courts and on what basis have they been empaneled? Original Peoples are invisible people in these courts, not because their rights do not qualify, but because the courts refuse to see them. There is no substantive difference between the Original institutions of civil society that

2 “...for example, the characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them.” Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004

functioned in the Pacific, the “New World” before European contact, and the new courts of imperialism which were installed by force. The inability or unwillingness of western people to credit “savages” with functioning civil governments does not remove their existence. The difference between Anglo European legal systems and that of Original Peoples may not be so exotic. Precedence created by Papal Bulls and doctrines favoring one kind of title over another, or one kind of right over another, has been largely based on European creations of race.

If we look at the question of Original Peoples’ land tenure, does the Original land title look so different from western instruments, or does the *human* possessing the title appear somehow strange to the viewer? I posit it is the human that is *strange* to western claimants who wished to dispose of or claim property free of costs from the actual owners. For example, Hawai’i’s title history, which predates its occupation, reveals a notable difference in its formation and standing. Hawaiian title was formed under an Allodial³ mandate specifically intended to protect against seizure of its title grants by one of the many military powers coveting the Hawaiian Islands. Hawaiians held a convention to quiet land title⁴ in 1848, known as the Great Mahele⁵. The Mahele should have adequately preserved title interest in courts of nations

3 "All lands within the state are declared to be allodial, and feudal tenures are prohibited. On this point counsel contended, first, that one of the principal elements of feudal tenures was, that the feudatory could not independently alien or dispose of his fee; and secondly, that the term allodial describes free and absolute ownership, ... independent ownership, in like manner as personal property is held; the entire right and dominion; that it applies to lands held of no superior to whom the owner owes homage or fealty or military service, and describes an estate subservient to the purposes of commerce, and alienable at the will of the owner; the most ample and perfect interest which can be owned in land." *Barker v Dayton 28 Wisconsin 367 (1871)*.

4 Quiet Title Action -A proceeding to establish an individual's right to ownership of real property against one or more adverse claimants.

5 The Great Mahele was several conventions that assigned land title or Royal Patent grants. The land was secured in Allodium or inalienable title. All title was subject to a tenant farmer right derived from traditional understandings and explained with mosaic law. Known in Hawaiian as *Ua koe ke kuleana o na kanaka*, That right was the paramount law of Hawaiian land tenure and afforded any Hawaiian subject the right to cultivate any lands left fallow. As long as the “kuleana” or right was being used, no one, not even the King could remove the Kanaka [person].

with whom the Hawaiian Kingdom had Treaties⁶ and which accepted Hawaiian Royal Patent Land Grants.

As demonstrated in the defendant's filing⁷ in *Damon v. Hawaii 1904*, the Royal Patent Grants of the Hawaiians were: “*something anomalous or monstrous*.” This is the concept that was applied to Original title and we could assert is now translated into the term “Native title”. This new version of a *defective* title has been very successful in continuing the alienation of Original Peoples' lands. Yet, the language that is applied by imperialism, as in “Native title”, does not have to be accepted by Original Peoples.

In a number of early Hawaiian occupation cases, the adoption of Hawaiian Kingdom statutes by the territory of Hawaii were challenged. For example in *Damon v. Hawaii*, 194 U.S. 154 (1904) the Supreme Court of the United States found, that the Great Mahele of 1848, where the Hawaiian government quieted land titles and established vested rights such as basic title, fishing, common access, was upheld. In that case, title established by the Hawaiian Kingdom was not effectively dissolved by occupation. The plaintiff's claim was to the fishing rights to the reef attached to his land grant and contained within his deed. American Supreme Court Justice Oliver Wendell Holmes, who delivered the opinion of the Court, wrote,

“A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested

6 In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of Treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd, 1826, Dec. 20th, 1849, May 4th, 1870, Jan. 30th, 1875, Sept. 11th, 1883, and Dec. 6th, 1884), Britain (Nov. 16th, 1836 and July 10th, 1851), the Free Cities of Bremen (Aug. 7th, 1851) and Hamburg (Jan. 8th, 1848), France (July 17th, 1839), Austria-Hungary (June 18th, 1875), Belgium (Oct. 4th, 1862), Denmark (Oct. 19th, 1846), Germany (March 25th, 1879), France (Oct. 29th, 1857), Japan (Aug. 19th, 1871), Portugal (May 5th, 1882), Italy (July 22nd, 1863), the Netherlands (Oct. 16th, 1862), Russia (June 19th, 1869), Samoa (March 20th, 1887), Switzerland (July 20th, 1864), Spain (Oct. 29th, 1863), and Sweden and Norway (July 1st, 1852). Furthermore, the Hawaiian Kingdom became a full member of the Universal Postal Union on January 1st, 1882.

7 *Damon v. Hawai'i*, 194 U.S. 154 (1904) The defendant was represented by Attorney General of the territory of Hawai'i.

right...The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right."

This right, this Hawaiian right, stands up and is no different in substance to any other Original title source coming from the beginning of time. Paper becomes just an obstacle to illegal seizures of land in this era of "Discovery".

It is hard to find a comparable case to the American usurpation of Hawaiian vested interests, but looking into the history of the United States, we see examples that can speak to the prior rights issues. We see the U.S. legal precedence that French and Spanish law governed land grants in Louisiana after the 1803 purchase by America. Yet, all efforts of the new Louisiana legislature to repeal the "ancient" laws have failed, even to this day. How then do we assess the presence of the ancient laws of the Original Peoples that were also in practice in Louisiana?⁸ Were these ancient laws successfully repealed?

When we look at the fundamental laws that created the U.S. courts, do we see an impartial view of the Original Peoples of North America? No. What we find is the American acceptance of rulings based on racism, theories of superiority or manifest destiny. In fact, in the recent *United States v. Jicarilla Apache Nation* 88 Fed. Cl. 1,4 (2009), the decision is firmly built upon doctrines of Discovery to aid American imperialism. This case decided that all Tribal nations' rights were subject to the plenary powers of Congress and non-reviewable by the Supreme Court.

The decision in *Jicarilla* is actually liberating for Original People because now the people can begin to assemble, create new precedence in law through our jurisdictions. This ruling may be construed to mean that Original Peoples of North America have exhausted all remedy

8 The Chitimacha law was the law of the land before European arrival and is still active today. The renaming of Chitimacha country to Louisiana was an attempt to abolish law to establish colonial control.

within United States. What I mean by “exhausted all remedy” is that the U.S. Supreme court made clear that in the case of “Indian Law,” those who have placed themselves under that federal jurisdiction are subject to the whim of the ever changing U.S. Congress. Yet, the American Congress, by its history, can only be described as acting out a policy of genocide toward their *Indian wards*. Many Original People reject this control. The late Russell Means, when taking a position on the breach of the Lakota/U.S. Treaty, literally tore up the treaty and declared that the Lakota People returned to full sovereignty of their nation.

In an effort to further mislead Original People, they are often persuaded that “special” descriptions would be more advantageous and powerful to them for maintaining their identity and compensating them for their injuries; that this separation would lead to swift and more effective change in their status. Original People do not realize that these “special descriptions,” such as “indigenous” or “Indians” may prevent them from possessing and activating their rights by asserting “ancient laws,” which were/are well known to the world.

Original nations know their people and their borders. There is no legal basis for extra-territorial jurisdiction. Kal Raustiala *Professor, UCLA School of Law and UCLA International Institute writes, in the Geography of Justice*, “Why is geographic location thought to be determinative of the constitutional rights of aliens abroad? The supposition that law and legal remedies are connected to, or limited by, territorial location—a concept I term “legal spatiality”—is commonplace and intuitive.”⁹ Professor Raustiala continues, “that the soil itself is critical to determining what constitutional rights a person holds”. I interpret this also to infer what Constitution governs those rights of humans living in a certain place.

Who makes the determination of spatial sovereignty? Original Peoples can themselves exercise the universal understanding of the limits of legal reach of others imposing foreign laws upon them. In the case of Hawai’i, its Constitution was well known to America prior to and at the time of occupation. After occupation, the Americans adopted the Fundamental Laws of the Hawaiian Kingdom as the legal basis

9 “The Geography of Justice,” Kal Raustiala, University of California, Los Angeles (UCLA)—School of Law, *Fordham Law Review*, 2005, page no. 4

for their provisional government and “state.” Yet, Hawaiians cannot easily recognize or access the very rights they have always held.

In the wider Pacific, various imperialistic constructions of rights were imposed and applied to Pacific Peoples, all of which contain limitations. In Aotearoa, the interpretation of the Treaty of Waitangi is enforced and implemented by non-Maori people. Although this Treaty “appears” to be more favorable to Maori rights than the legal situation in Australia with Aboriginal peoples, land grabs continue in a never ending attempt to squash real sovereignty. In the case of sovereign Nauru, its history contains an almost total destruction of its *Pleasant Island* by its literal removal as a result of phosphate mining begun during German possession and continued under Australian trusteeship¹⁰. The continued degrading treatment of the Nauruan People is still controlled by Australia and her hold on the islands’ economics.

Our Sovereignty

“Referendum?! Constitution?! That mob that handed the paper to the government do not represent me, my family or my community. I am an Aboriginal man of five nations and I have never ceded any degree of my national sovereignty to the British crown. My lands were invaded and then occupied by force of arms. The British have carried out a horrific war of genocide against our peoples since 1788. I will never surrender to the enemy and I will continue to fight for justice until the day I die. Onetime !!”¹¹

What is the articulation of sovereignty? Western thinkers appear to believe that the definition of sovereignty is still up for debate, which may create a vacuum we can fill with a straight forward approach. The idea of sovereignty is that of rights given by the creator and the creator placed certain peoples in certain lands we can know as the “owners.” These are the Original People of those lands who hold the

10 The trusteeship of Nauru was mandated by the United Nations in 1947 to the original trust administrators of England, New Zealand and Australia. New Zealand and England have long since accepted the Australians as taking sole responsibility for the rehabilitation of the island.

11 Sam Watson, Aboriginal community worker & activist, FaceBook January 15, 2012

Allodium Absolute or inalienable rights to care for the land. History shows that belligerent military invasion does not erase sovereignty, and the countries subscribing to the “Law of Nations” doctrine have limited their ability to make legal claims of colonization.¹² As such, sovereignty can be an effective tool that articulates a level playing field when determining who owns what right.

“Furthermore, if sovereignty is so intimately connected with the problem of cultural difference, and if it is explicitly shaped in such a manner as to empower certain cultures while suppressing others, vital questions must arise as to whether and how sovereignty may be utilized by these suppressed cultures for their own purposes.”¹³

The misapplication of identity and rights:

How do we define “allegiance,” “protection” and “reciprocity” as it applies to Original Peoples? Taken from common law, these concepts easily fit Original Peoples’ understanding of their own identity and rights. The defining and use of allegiance, protection and reciprocity existed in the nearly three hundred year relationship with settlers from Europe in North America. However, in 1823, this completely changed with a ruling in one case that has singularly effected legal jurisprudence in common law, as applied to land title of Original People...*Johnson v. McIntosh*¹⁴.

Decided in 1823, the implications of the ruling in *Johnson v. McIntosh* reach far beyond American shores and are cited to legitimize imperialism by all common law colonial powers. The decision, however, was rendered without due process or notice to the essential

12 Emer de Vattel (25 April 1714 – 28 December 1767) Law of Nations, 1758.”The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”

13 Antony Anghie, Laws of the Postcolonial-edited by Eve Darian-Smith, Peter Fitzpatrick, University of Michigan Press 1999, p. 104

14 *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) From Chief Justice Marshall's opinion "that discovery gave title to the government by whose subjects it was made, against all other European governments [which] necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives."

party, the original land owners themselves, who, as a result, were not represented in the case. The dispute was between two land claimants who claimed to have acquired title from individual Indian¹⁵ sellers prior to the American Revolution. Each claimant sought U.S. recognition of their title purchased from the Piankeshaw¹⁶ tribe under the British domain in 1773 and 1775. The U.S. Supreme Court, led by Chief Justice Marshall found that Indian land title is subject to the Doctrine of Discovery and therefore, alienable by acts of U.S. legislation. Yet, the Court further ruled that individual Indians did not hold land title, but rather only tribes, as an “entity,” could hold title. The court ruled that possession of land was with limited sovereignty, only.

One question not often articulated is, “Who is the Supreme Court of the United States in *Johnson v. McIntosh*?” In the absence of the original land owners’ participation in this case, we can only conclude that the Supreme Court, in a practical sense, represents McIntosh and then rules in the state’s interest. The ruling effectively opened up huge tracks of land for uncompensated alienation. The seizure of Indian land rested on the ability of the United States to be the sole interpreter of law. The disenfranchisement of the Indians’ vested rights did not affect colonial titles; in effect, the Supreme Court ruled that rights could be recognized as per race. This was a clear violation of U.S. Fourteenth amendment of equal protection under the law of 1863, which should have annulled the 1823 *Johnson v. McIntosh* ruling, but did not.

The United States’ intentional separation of peoples’ legal status, when under a claim of U.S. jurisdiction, resulted in an unequal application of rights so as to complete the U.S. policy of land seizure by discovery. Today, “special” descriptions are the modern day enforcement and continuation of the *Johnson v. McIntosh* ruling.

15 The use of the word “Indian” reflects colonial context. Original Peoples’ self-description is by traditional application and by many other real names. Thus, when referenced as *Indians* it is to be taken as “so-called.”

16 The Piankeshaw (or Piankashaw) *Indians* were Original Peoples, and members of the Miami tribe who lived apart from the rest of the Miami nation. They lived in an area that now includes western Indiana and Ohio.

According to the late Edward Wadie Saïd,¹⁷ a Palestinian Arab born in the city of Jerusalem, a professor of English and Comparative Literature at Columbia University and advocate for the political and the human rights of the Palestinian people,

“All knowledge that is about human society, and not about the natural world, is historical knowledge, and therefore rests upon judgment and interpretation. This is not to say that facts or data are nonexistent, but that facts get their importance from what is made of them in interpretation... for interpretations depend very much on who the interpreter is, who he or she is addressing, what his or her purpose is, at what historical moment the interpretation takes place.”

“...The dense fabric of secular life is what can't be herded under the rubric of national identity or can't be made entirely to respond to this phony idea of a paranoid frontier separating “us” from “them.”¹⁸

Johnson V Mc'Intosh appears to be the first example of an extra-territorial decision of an American court that confirms the policy of genocide still practiced today by the American government. The meaning and intent of the court decision are clear, as history attests, as the decision reduced human rights and became a judicial tool of piracy. The Americans violated their own tenants of law, because they held the superior military power and felt no need to honor treaties with “savages nations”.

I suggest that the single purpose that the United States has continued to pursue in terms of Tribal Nation policies is to effectively subdue legal challenges by Indian nations aimed at exercising their sovereign rights. This ability to interpret statutes to the advantage of the United

17 Edward Wadie Saïd Arabic: إدوارد وديع سعيد; (1 November 1935–25 September 2003) was a Palestinian-American, literary theorist and advocate for Palestinian rights. He was University Professor of English and Comparative Literature at Columbia University and a founding figure in post-colonialism.

18 *The Pre-occupation of Postcolonial Studies- Covering Islam*, (pp. 154–155) edited by Fawzia Afzal-Khan, Kalpana Seshadri-Crooks, Duke University Press, 2000

States has worked so well for America because the sovereign Indian nations have accepted the very tools of their dismantling by submitting to U.S. jurisdiction. Instead of the rights of sovereigns or even the American constitutional rights of citizens, Indian citizens enjoy neither to a full extent.

Johnson v. McIntosh was decided in the common law arena and seized upon by members of the club of colonial countries as a way to create limitations on the land rights of indigenous nations of which these countries intended to take possession. But, in the case of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), it was determined that African Americans “were not protected by the Constitution and could never be U.S. Citizens,” which confirmed and *continued the policies of imperialism*. This decision had devastating consequences for its victims and yet, found a basis in American law for decades. Today, African Americans would no more subject themselves to the *Dred Scott* decision, than to a separate but equal assertion.

So why then do Original Peoples apply *Johnson V Mc’Intosh* to themselves today? In other words, when accepting the American description as in, Indigenous or Native, terms which are federally defined to limit claims to lands, sovereignty and self-determination, you accept a less than human status. Yet, these terms and descriptions are actively marketed to Original People as a method by which they may “legally” access and exercise their language, culture and rights.

The *Johnson* discovery rule has not only diminished native rights in the United States, but has also influenced the definition of indigenous land rights in Australia, Canada, and New Zealand. In 1836, British lawyer William Burge cited *Johnson v. McIntosh* in support of his conclusion that a private purchase of some 600,000 acres from the Australian Aborigines was invalid as it was against the Crown. British land speculators, settlers, and government officials quoted American jurists in disputes concerning the annexation of New Zealand in the 1840s, and Johnson figured prominently in the colony’s first judicial decision regarding Maori property rights. Likewise, when the

existence and scope of aboriginal title was finally litigated in Canada in the 1880s, the *Johnson* decision played a major role in its ruling.¹⁹

Professor Watson points out how seamlessly the courts in New Zealand, Australia and Canada latched on to *Johnson v. McIntosh* as a basis for state land policy. It becomes a very convenient legal excuse to remove Treaty obligations, as the United States has claimed to have successfully done. The seediness of this process of outrageous greed cannot dictate any human being's acceptance of its artifice. Implying that Original Peoples all over the world must continue to be subjected to such legal absurdities, is beyond contempt. Original Peoples have the fundamental right to reject slavery in any form and the persons described in the case were not the original owners of the land.

So, one must ask, when considering a self-description, or description to the original society: "Exactly what rights are being accessed when Original Peoples describe themselves as Indian, Indigenous or Native?" An "*Indigenous*," "*Native*," or "*Indian*" self-description is designed to appeal to one's pride in one's heritage, but it is dangerous when applied to a legal process because these labels affect rights which are limited to the American interpretation as opposed to sovereign rights that come with independence. The reason the U.S. encourages Original Peoples to adopt these "titles" is tied to whatever American "entitlements" or "rights" a person can access in a claim as a ward of the State. The western use of chauvinism and ethnic pride is designed and utilized to confuse people, to steal one's very language and allows them to be corralled into a misapplication of identity. The power is not in "special" rights or classifications defined by the U.S., but in the "same" rights, the rights that imperialists keep for themselves. The distraction of "us" and "them" prevents Original People from taking a seat at the same table as equals with the rest of the world. It dehumanizes the Original population.

"For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be

¹⁹ Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand* . April 1, 2011 *Seattle University Law Review*, Vol. 34, No. 2, p. 507, 2011

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to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization.”²⁰

Dehumanization and Violence

Dehumanization and violence are the two factors that dominate the experience of many Original nations today, which no amount of analysis of western jurisprudence will fix. The action of Original Peoples taking control of their lives, including the creation of their own judiciary, will make a difference for Original People today.

Do guns take precedence over clearly defined rights? The truth is that occupiers have no legal basis to impose a foreign constitution within the borders of an established nation. However, this does not prevent the enslavement of native populations within the occupied territories. Currently, the demand for and exercise of original rights is often met with violence and imprisonment.

A simple remedy would be the removal of all legal applications that view Original Peoples as less than human and the end to applications based on doctrines, such as the doctrine of discovery. It is the western colonial assertion of dehumanization, combined with the willingness to employ violence that aids the continuation of western title in the world today. Today, the relations between Original Peoples and the militarized powers are undermined by threat and use of violence against the Original People. Violent threats should be exposed in Original communities and brought to the fore by organizations such as the United Nations with an insistence that they be rejected. Insisting on the unconditional removal of threats of violence by the military presence in the world, must be a mandate of the international community and may be the only way to begin positive change to the Original Peoples’ nations. International Law, including universal human rights norms, demands changes to policies of dehumanization and requires an immediate repudiation of any doctrine of violence and threat of violence, including unlawful imprisonment, by the global community.

20 “Hawai’I, History and International Law,” *Mathew Craven*, *Hawaiian Journal of Law and Politics*, page 2, Vol.1 (Summer 2004).

Jus Heredes

The Aboriginal tent embassy in Canberra, Australia, founded in the early 1970's, proposed that permission was not needed to assert Original Peoples' rights. In Hawaii, the constitutional monarchy was established at the beginning of her relationship with Europeans and functioned successfully for many years. Hawaiians (Kanaka Maoli) are waking up to the ability to return to their own self-governance by using their original constitutionally established institutions. Why hasn't this been restored yet? The Hawaiian model is unique and can, in theory, pave the way for many other Original sovereigns to breathe the fresh air of equality and sovereign rights again. I encourage the planting of the Original flag back in their own lands and insisting on the rights that were (and are) well known for their quality of justice.

It seems appropriate to offer a Latin phrase to propose a new doctrine rooted in geography and traditions: *Jus Heredes* or Law of the Heirs. For so long we have struggled with ideas of race, blood quantum and ethnic identities, which creates confusion. The main purpose of such ideas is to lead Original peoples away from the source of their rights by persuading an entire original people to accept descriptions and mis-characterizations to legitimize the policies of Manifest Destiny and its accompanying imperialism.

My Winnemem Wintu [Middle River Tribe] friend told me he was part "white," but he could not prove it. That was, of course, a joke, but inside a real sorrow. The only reason to attach rights to race is to remove all claims sooner or later. The only choice for Original People is to fully reject race- based laws. Such laws create havoc in communities around the world and have no connection on the whole with traditions of Original People. Original People simply have the right to ownership, not unlike the first world, in terms of heirs and successors.

Jus Heredes can create legal equality today. The doctrine requires the legal examination of "title", so that we ascertain the "break in title" in order to access a just remedy. Contrary to *Johnson v. McIntosh*, the court would have to artfully recognize the origin of peoples' rights, not by foreign claimants, but by the owners themselves. *Jus Heredes*

solidifies the absurdity that lands rights in Aotearoa originated in Britain, or land rights in Hawai'i originated in the United States. Without *Jus Heredes*, a tremendous injustice is done to Original People who, themselves may be misled into believing that officers of State courts are knowledgeable about Original rights, or that there is a legal mandate that Courts recognize these rights.

Jus Heredes also asserts that no person should be subject to doctrines that do not share rights equally among all peoples. Original Peoples have seen the concepts of western land ownership used against them. Europeans latched onto the idea "Indians" cannot own land, conveniently leaving the land "open for the taking." Often Original peoples find themselves confined by the past, reviewing first contact, arguing against horrible genocidal acts from Columbus in the Caribbean to the English massacres in Tasmania. Too often, Original People define themselves by the injuries suffered and not by the rights that sustain them—rights that have always been in the possession of Original People and which can be applied by them today.

Remedy After Realization

Original Peoples have gone to the foreign and imperial courts in their own lands in an attempt to preserve their rights and status. Original Peoples have not forgotten their traditional basis for adjudicating their own matters, and can easily assemble the necessary agreement on fundamental principles that will guide creation of their own court.

The Universal Declaration of Human Rights states that everyone has duties to the community in which alone the free and full development of his personality is possible (Article 29(a)). This backdrop provides a basis for an Original Court of Remedy, exactly the same as European-based courts. The Original Peoples' court would be a court that would address conflicts involving human rights violated by the government.

Such a court could be modeled after the International Court of Justice (ICJ) or the American Alien Tort Claims Court. It could review nation-to-nation disputes, violation of human rights and injuries created by cross-border complaints. The process would be

fluid and several types of courts might be formed: a human rights court, a court of claims, a court of criminal justice and an alien tort claims court. What would be actionable? Violations of sovereignty of nations, violation of human rights by any country against a person, violation of rights of countries, individuals or communities by corporations would come under their jurisdiction. Such a court could act as a higher court when basic rights have been violated and persons have exhausted remedies in their own country. The court would be established by the founding member nations in consultation with and full participation of their citizens. A convention of members to empanel the court and determine the elements of its charter would be a necessary step to begin. The constitution of the court would include the description of rights, guaranteeing non-discrimination among all human beings.

Although some countries may question the validity of such courts, or want to dismiss the process as ineffective, they would be wrong. Original Peoples' courts could easily equal the legitimacy of the ICJ and perhaps surpass its enforcement capacity. Member Nations could consider sanctions on defendants that do not comply with rulings. It could create a venue to address issues not settled, promoting peace out of chaos. It could fill a vacuum of law that cries out to be filled.

The court could promote a more sustainable environment for the benefit of the whole world. It could specify that all peoples have a legitimate legal interest in their lands, an interest preserved for the world's benefit, accessible to them in the condition charged to them by the Creator and inherited by their forefathers. What is law, if not an agreement on what is right? It is a way to preserve what is right and to preserve peace, including the peace of the land. Original Peoples would know what their position, identity, and responsibilities are, and what needs to be done to correct and preserve the future of their beloved countries.

Original Peoples possess their own sovereignty, they already have it. Original People need to utilize it regardless of the response from States. Original Peoples can mitigate negative reaction by being professional in their approach, but strong in their resolve: the more

they are opposed, the more steadfast they must become. After all, this is a matter of the very survival of Original People on this earth. Sovereignty cannot live inside a prison structure. It will only flourish with free people who exercise sovereign rights.

“Let the echo of our song be heard around the world.”²¹

21 The Echo of Our Song: Chants and Poems of the Hawaiians by Mary Kawena Pukui (Editor, Translator), Alfons L. Korn (Editor) University of Hawaii Press, 1979