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# INDIGENOUS SELF–DETERMINATION AND ITS IMPLEMENTATION

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A political scientist examines the parallels between Hawai'i and the Northern Territory of Australia with respect to statehood and the self-determination of their indigenes, including a consideration of the bases on which the indigenous right of self-determination rests and of the questions associated with its implementation.

In mid-1998 I was interviewed in Honolulu by an Australian legislator engaged in the drafting of a constitution for the Northern Territory. The explanation for the visit could only remotely be traced to historical happenstance —that Captain Cook introduced the Western world to the existence of both Australia and the Hawaiian Islands. Rather, the visit was attributable to the parallels between that territory's current search for statehood within Australia's federal system of government and Hawai'i's experience as the last incorporated territory of the United States before becoming a state in 1959. I had helped to compile the supporting data necessary for the framing of Hawai'i's constitution, and later, after Hawai'i's admission, had participated in a number of the actions necessary to reshape what had been a subordinate territory into a functioning, coequal member of the American federal union. Much of this experience was related in a book I had long ago published, the contents of which constituted the reason for the Australian's visit.[1]

It would perhaps be instructive for those not familiar with Hawai'i's long course toward statehood to know that on at least seventeen different occasions, starting in 1903, the Hawaii Territorial Legislature had petitioned the U.S. Congress for admission, only to be denied.[2] Finally, despairing of the Congress ever adopting an Enabling Act, which would authorize the territory to prepare for statehood, Hawai'i took matters into its own hands and in

1951 presented Washington with a state constitution drawn by elected delegates and approved by its voters, evidence that the islands were able and ready to become a state.[3] Admission followed in 1959, but only after a second plebiscite required by the Congress demonstrated that Hawai'i's electors approved of statehood and consented to the constitutional changes demanded by the Congress. In view of the Hawaiian sovereignty movement, this history becomes pertinent because there were territorial legislators of Hawaiian ancestry who participated in the statehood drive from its very inception.[4] The percentages of Hawaiians' votes that were affirmative or negative in the plebiscites are unknown. The Hawaiian sovereignty movement today faults the whole process for not observing the criteria of international law providing for formal decolonization of non–self-governing territories and for continuing to deny the indigenous population full scope of self-determination to this day.[5]

There are vast differences between Hawai'i and Australia's Northern Territory, including the cultures of the indigenous people who inhabit each and their histories of political participation. Unlike Hawai'i, where indigenous inhabitants had a political role from the days of discovery, "until mid-20th Century Aborigines played little part in Australian politics."[6] Indeed, Aborigines lacked legal status as full citizens until then.[7] But the very making of this statement calling attention to the differences between the areas highlights their commonality: both have sizable indigenous minorities, which provides the raison d'être for this essay. Although Aborigines comprise less than 2 percent of the total Australian population, they form a quarter of the Northern Territory's.[8] (Larger absolute numbers of Aborigines live within the boundaries of some of the Australian states, particularly Queensland, but they comprise only small proportions of the respective states' inhabitants.) Similarly, persons of Hawaiian ancestry outside of Hawai'i constitute only small minorities where found, even though their numbers may even exceed those within the state. Indigenous Hawaiians living in the Hawaiian Islands comprise about one-fifth of the state's people.[9]

The indigenous cultures of both Hawai'i and Australia spiritually identify with land, so for them it cannot be treated as merely an economic commodity: people belong to the land rather than the converse. Given this importance, traditional rights to land are frequently the pivotal issue around which politics turn in both areas, notwithstanding the disparities between them. During the Hawaiian monarchy the Great Mahele sought to replace the Hawaiian system of traditional land titles with one of allodial land rights.[10] On the other hand, in Australia the courts are only now recognizing the existence of Aboriginal land rights. Despite this difference, the issue contributes a commonality that influences the shape of indigenous self-determination in both areas.

When I was contacted by my Australian visitor, I inquired about the steps being taken to involve Aborigines in the political process of constitutional formulation. The responses were evasive.[11] I was mindful that the flourishing of the Hawaiian sovereignty movement occurred *after* statehood and has subsequently assumed many forms. Some of its advocates stridently demand not only internal self-government for Hawaiians but complete separation of Hawai'i from the United States to form an independent nation.[12] In view of the marginalization of Aborigines in Australia, and in anticipation of their raising objections similar to those now being voiced in Hawai'i, after my visitor left I initially turned my attention to consideration of what might have been done differently to afford the Hawaiian Islands' indigenous population a distinctive voice, which could suggest minimal safeguards against comparable challenges in Australia.[13] From this evolved a more fundamental question, the examination of which occupies much of the balance of my discussion here: What is the compelling logic on which self-determination for indigenes rests, which, as well, underpins the process to be adopted by Pacific peoples for implementing it?

Until colonialism was discredited, the metropolitan nations of the Western world had divided up between them and governed the island areas of the Pacific as colonies. After World War II, beginning with Western Samoa in 1962, one Pacific island polity after another had become either politically independent of its former administering metropolis or entered into varied relationships that enabled them to exercise augmented powers of self-government, even if not completely independent as sovereign nations. The rhetoric that accompanied this change cloaked the entire movement as being "anti-colonial" in nature, with the result that limitations on indigenous self-rule became categorized as expressions of colonialism. For Hawai'i, this conveniently encompasses the overthrow of the Hawaiian monarchy through the connivance of the armed forces of the United States, the short interregnum of the Republic of Hawaii while awaiting congressional action on annexation, the next half-century-plus of territorial status, and now the integration into the Union as a state.[14]

## Meaning of "Indigenous"

> The history of self-determination is bound up with the history of popular sovereignty, as proclaimed by the French and American Revolutions . . . [that] people living in a geographically distinct part of an existing state who are not content with the government of the country to which they belong should be able to secede and organize themselves as they wish.[15]

The League of Nations introduced the term "indigenous" as identifying populations that required protection under the League of Nations Covenant. This term much later entered into United Nations Fourth Committee debates on decolonization.[16] Subsequently a gradual consensus developed among the members of the Working Group on Indigenous Populations of the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities that indigenous peoples enjoyed a natural right of self-determination and that "as a specific form of exercising their right to self-determination, [they] have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion" and so forth.[17] But while the term "indigenous" has emerged, it has no accepted, established definition.[18]

If one were to accept the thesis that there are two basically distinctive cultures in the world, one of the metropolitan societies and the other indigenous,[19] Pacific peoples would fall within the latter, thereby so establishing their right to self-determination. However, this proves too facile, for it is too all-embracing. For illustration, neither the i-Kiribati resettled in the Solomon Islands by the British government before the Solomons became independent[20] nor the Banabans who acquired the island of Rabi in Fiji on which to live after rapacious phosphate mining had literally consumed their original home island[21] would be treated as having "indigenous" rights of self-determination in their adopted island abodes. Nor would they be entitled to protection as minorities against ethnic discrimination by the Solomons and Fiji governments, respectively.

To take another tack and settle on a definition of "indigenous" as limited to only those who are descendants of the original inhabitants of a particular Pacific island may introduce hazardous problems for the future. Before the Maori arrived in New Zealand, it is claimed there had been other peoples resident, the Moriori (some of whom were still found in the Chatham Islands on first Western contact). To Hawaiians' sovereignty claims as indigenes, objection has yet to be raised on the basis that prior to the arrival of their canoes in the Hawaiian Islands from the south about the beginning of the Christian Era, a small, dwarfish peoples—the Menehune—were apparently dwelling there. They were probably pushed into the mountainous interiors, leaving massive dressed-stone works that to this day mark their presence on the island of Kaua'i. In Micronesia, the Carolinians point to the existing names of geographic areas on the island of Saipan as proof that they had preceded the Chamorros, casting doubt on the claim of the latter to be the initial inhabitants of the Marianas.

In short, rather than necessarily turning on original habitation, indigenous status involves a number of elements relevant to the purpose for which the delimitation is being made. These include both objective criteria such as

agreed-upon historical continuity and subjective factors including self-identification. With respect to the right of self-determination, an acceptable working definition could posit "indigenes" as

> a group of people who fulfill the following criteria:
> —they are descendants of a people who lived in the region prior to the arrival of settlers coming in from the outside, settlers who since have become the dominant population;
> —they have maintained a culture which is different in significant aspects from that of the dominant population;
> —they are, as a group, in an inferior position in the country concerned, in political and economic aspects.[22]

To compound the ambiguity surrounding the meaning of "indigenous" status and attributing corresponding rights, it might be pointed out that during the long, active period of the Bougainville revolution there was no external championing of this attempted secession from Papua New Guinea as a classic case of an indigenous people's exercising its right of self-determination. The Nasioi speakers who claim the land on which the controversial Bougainville Copper Limited mine was developed furnished the core leadership of the Bougainville Revolutionary Army. The ancestors of those Nasioi speakers arrived millennia before settlers ancestral to the users of quite unrelated languages to the north reached Bougainville. After Western contact, a copra-plantation colonialism instituted by German and then Australian growers contributed to the fractionating of the Nasioi speakers. The marked social consequences that followed were later echoed in various ways by the intrusive effects of the hordes of construction workers with their different cultural backgrounds who descended on the island to erect what was to be the world's largest open-pit mine. Its undertaking required the leasing of a vast acreage of Nasioi land for both the mine and for the governmental administrative headquarters of the Panguna area. The relocating of the individual landowners and even small villages introduced further disruption. Although the ore would be dug from Nasioi land, its content of gold and copper would belong to the state under Australian (and later Papua New Guinean) law—not to the surface owner. Fanned by displacement, dissatisfaction with compensation payments, and many other irritating factors, violence broke out and the Papua New Guinea government sent in the police mobile squad with the Papua New Guinea Defence Force. Peacekeeping by the police degenerated into outright jungle warfare. Now the dark-skinned Bougainvilleans found themselves arrayed against the "redskin" troops of the "mainland," and secessionist sentiment mounted. These various elements cumulatively lend

support to the claim that the Nasioi speakers as an indigenous people were entitled to assert their right of self-determination—in this case, secession. Nevertheless, the Bougainville revolution was never seriously viewed in that light and continued to be treated as a non-indigenous matter, internal to Papua New Guinea.[23] The explanation for this probably lies in the struggle not falling within the normal colonial paradigm.

## Other Grounds for Self-Determination

Besides reliance upon the abstraction of natural right, that is, an inherent right of all indigenes, a people's claim to self-determination may also rest upon other grounds, moral as well as legalistic in nature. As a political and economic minority, many culturally disorganized and living in poverty, indigenes may disproportionately populate the prisons and jails, and suffer a high incidence of serious diseases and truncated life spans, thus constituting living proof of social injustice. Change of political status through self-determination, on the premise that it will counter indigenous demoralization and lead to rehabilitation, thus becomes a humanistic imperative.

Recalling the horrors of history serves as reinforcement for this moral right. For Aborigines, "disease, murder, and starvation by isolation from natural resources eliminated the great majority of the population"[24] and massacres continued up to the 1920s and 1930s.[25] Although the Hawaiians did not suffer so physically traumatic an experience, the decline of the Hawaiian population and the overthrow of the monarchy in 1893, followed by annexation near the turn of the century, are claimed to have profoundly undermined the Hawaiian culture, helping to destroy the Hawaiian people's sense of community. The overthrow also logically underlies what may be regarded as the Hawaiian sovereignty movement's legal claim. The deposing of Hawai'i's last queen occurred with the connivance of the United States, and the annexation that followed occurred against strong opposition registered by Hawai'i's indigenous population, evidenced by a 566-page petition of that day containing some 21,000 Hawaiian signatures.[26]

At the time of the overthrow, the Hawaiian monarchy enjoyed diplomatic relations with the various Great Powers, including the United States, all pledged to honoring the existence of the monarchy. A report prepared for the Working Group on Indigenous Populations that is now before the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities —where it will be reviewed and edited—considers the overthrow as having taken place unlawfully.[27] Similarly, the apology of the United States to the Hawaiians in U.S. Public Law 103–105 recognizes the suppression of their inherent sovereignty.[28] Although at this late date few seriously support resto-

ration of the monarchy and elevation of a descendant of the deposed queen to the throne,[29] the present status of Hawai'i as a state of the United States may be subjected to review on the world scene. Meanwhile, all these elements lend a legalistic character to claims for Hawaiian self-determination as sought by various components of the Hawaiian sovereignty movement.

Another manifestation of the legalistic character may be found in the contractlike relationships that are relied on to support indigenous claims. In New Zealand, stemming from reconsideration of the Treaty of Waitangi, the courts have determined that under the treaty the Crown owes a fiduciary duty to the Maori tribes.[30] For enforcement, recourse is to political action rather than judicial decision. The government has recognized various claims for traditional lands and fishing rights and, although accompanied by protests, has entered into a number of multimillion-dollar settlements with Maori tribes.

In the United States, from their inception the colonies had to deal with the Indian nations found within their borders; initially, agreements and colonial laws controlled these relations. The U.S. Constitution (art. 2, sect. 2) established that the judicial power of the United States extends to treaties. The provision has long been applied to treaties with the American Indians. By virtue of the many treaties entered into between the federal government and Native American tribes, and also the voluminous legislation enacted by the U.S. Congress under the rubric of its constitutional power "to regulate commerce . . . with the Indian tribes" (art. 1, sect. 8), it has become the practice to regard American Indian rights and obligations positivistically, as legally premised, rather than as stemming from some inherent indigenous character of the American Indian, and recourse is to the courts for interpretation and enforcement, almost as though dealing with a contract. In Australia, no treaties were negotiated with its indigenous peoples, and prior to the *Mabo* v. *Queensland* case there was no Australian recognition of Aboriginal law and land rights.[31]

In the case of Hawaiians, who are not tribal like the Maori or Australian Aborigines, the U.S. Congress has yet expressly to identify them as encompassed within its constitutional power as it does the "Indian tribes." Notwithstanding, the Hawaiians have enjoyed many benefits under federal laws adopted for American Indians, and the executive branch has consistently treated Hawaiians administratively in the same manner as Indian tribes.[32] However, no treaty was ever entered into between the Hawaiians and the United States, for Hawai'i was incorporated into the Union by a joint resolution of the Congress, signed by the president, thus giving it the force of law. Both the Reagan and the Bush administrations questioned the constitutionality of enacting special monetary provisions solely for Hawaiians as being a

race-based classification violative of the equal protection clause of the U.S. Constitution.[33] The issue is not resolved.[34] Although Hawaiians continue to receive various forms of federal assistance paralleling that given American Indians, there has been a hesitancy to push the issue to constitutional closure.

In Australia, a number of statutory royalty payments are made to Aborigines or for their benefit, frequently for the mining of lands claimed by them. A very rough equivalent exists in Hawai'i, where "ceded" lands are required by federal law to be held in trust and used for a number of designated purposes, one of which is for Hawaiians of at least 50 percent indigenous heritage. (Currently, state statute earmarks 20 percent of ceded land revenues for Hawaiians, although the amount remains in dispute.) These were public or crown lands during the monarchy, and can be traced through the short-lived republic and the period of the territory to the present state. The sovereignty movement regards these lands as part of the Hawaiian heritage. More immediate to the issue of self-determination, both in Australia and Hawai'i specific lands have been identified that might become the corpus with which to begin building a sovereign entity.

As a result of the *Mabo* decision in 1992 and the following judicial rulings, all rejecting Australia's prior refusal to recognize the existence of Aboriginal law, indigenous land claims have assumed major economic as well as political significance in Australia. Coincidentally, at the same time as the Australian decision, the *P.A.S.H.* case introduced a comparably unsettling element into Hawai'i's land law with similar repercussions.[35] Tucked away in Hawai'i's statutes had long been protection of rights Hawaiians had customarily and traditionally exercised for subsistence and cultural purposes, a guarantee later added to the state constitution in 1977 (art. 12, sect. 7).[36] These rights included access for fishing, hunting, gathering, and water, an access to private land thought to be terminated once fee-simple title had been acquired. Now it appears that these rights on unimproved lands have been resuscitated by judicial decision, except insofar as they may be limited by regulatory state statute, so that absolute title to land is no longer a surety in Hawai'i. One of the potential consequences of the *Mabo* and *P.A.S.H.* judicial decisions has been to provide added political leverage for the indigenous movements seeking self-determination in the two respective areas.[37]

## Forms of Self-Determination

Turning to another aspect of the subject, there is not one form of political status but a variety from which indigenes may choose when expressing their right of self-determination. Indeed, in Australia the very designation "self-

determination" initially raised by the Whitlam Labour Party government for Aborigines proved so disturbing to the conservative Liberal–Country Party coalition—"because it smacked too much of real autonomy"—that upon regaining power in 1975 the conservatives attempted to reduce emphasis on status change by substituting the phrase "self-management."[38]

Actually, the concept "self-determination" suggests enough flexibility to encompass a wide range of self-governmental forms, indeed even metamorphosing from one status to another over time, such as from initial internal self-governance to ultimate complete external sovereignty. The Chamorro people of Guam furnish an example of such a stepped approach. Today, they are seeking U.S. commonwealth status, which they view as a strategic step to obtaining greater self-government from the U.S. government until they can resolve among themselves whether as the next step they favor complete independence for Guam, statehood, or some other, indeterminate status.[39] Any step toward constitutionally entrenching indigenous self-government needs to be carefully considered, for it can have both positive and negative consequences. Potential benefits may be outweighed by constitutional permanence that may eventually prove too narrowly confining.

If merely expressed in the form of a demand to regain a sovereignty that was usurped by the presently dominant people, an indigenous people's claim of right to self-determination can be ambiguous. The demand may refer only to redress through seeking internal sovereignty or it can be as broad as a call for an independent status equivalent to that of any sovereign nation. The Hawaiian sovereignty movement may serve as illustration of this breadth. Presently in Hawai'i there are almost innumerable groupings of Hawaiians, each advocating its own version of self-determination, but they roughly fit into three categories. One category seeks an entirely separate and independent Hawai'i, as previously mentioned; for these groups sovereignty is a complete transfer of power and a return of Hawai'i to the world community of nations. Another part of the movement seeks internal sovereignty, that is, a "nation within a nation" status, much like the American Indians enjoy in the mainland United States. The third segment does not advocate any specific status or structural changes in government, whether internally or externally; rather, it primarily supports much of the status quo so long as action is taken to redress the wrongs suffered by the Hawaiian people.[40]

The U.S. courts early ratified the constitutionality of the separate status of American Indian governments with limited sovereignty. In contrast, an Australian court has expressly rejected the possibility of a subordinate sovereignty for Aboriginal peoples within the overall Australian nation. However, in view of the recent decisions on Aboriginal rights, the logic of this case may no longer hold.[41] Canada, under the rubric of provisions in its constitu-

tion and its treaties with its "First Nations," has negotiated with the Inuit in the Yukon and Northwest Territories to set up separate nations within these territories.[42] Even in the absence of such provisions, it is not inconceivable to consider Australia establishing an Aboriginal nation within its Northern Territory. With respect to the Aborigines, there appear to be enough differences between the territory and the rest of Australia to provide a basis for supporting such distinctive action,[43] that is, if dissonances due to tribal differences do not contravene.

The negotiations ending the U.N. Trust Territory of the Pacific Islands furnish another illustration of the ambiguous nature of "sovereignty." As the Micronesians sought to exercise self-determination, they steadfastly continued to assert that they had never lost their sovereignty, despite the long interim under Spanish, German, Japanese, and American rule. On their part, the American negotiators insisted that the "sovereign independent status called for by the [Micronesian] draft Constitution" was "clearly inconsistent" with the subordinate character of the "free association" envisioned by the United States.[44] Ultimately, the Federated States of Micronesia succeeded in retaining its proposed constitution unchanged, the Republic of the Marshall Islands and the Republic of Belau enacted comparable constitutions, and all three emerged onto the world scene as freely associated states. (The Northern Marianas, the remaining portion of the trust territory, opted for commonwealth status within the United States.) Notwithstanding that the United States retains military access rights, and to protect American security may require the associated states to deny access to other countries, the United Nations regards them as independent and they are seated as full members in the General Assembly along with all of the other sovereign nations.

The federalism known to both Australia and the United States is normally regarded as embodying a dual sovereignty, with state government enjoying a degree of autonomy and self-government in ways that require sharing of powers with the central government. This formulation does not ignore the existence of a wholly separate tier of functioning local government, but rather elides it as merely being the creature of the states. In some areas of Australia, such as in the Northern Territory, in addition to statutory local government there are Aboriginal communities performing municipal-type functions servicing the needs of Aborigines within their areas. Today in the United States it is being suggested that the boundaries of federalism as now practiced have expanded from dual to quadruple sovereignty, so that the old formulation is no longer applicable. This reinvented construct of federalism consists of a partnership among federal, state, local, and Indian tribal governments.[45] Applying this reformulation to Australia, federalism would be viewed as involving recognition of the role of Aboriginal councils and other

forms of semiautonomous Aboriginal communities, thereby incorporating Aboriginal government as well as the other three levels into Australia's federal system.

## Implementation

> Broadly, there are two components, or connotations, associated with self-determination: one is structural and the other is procedural. The structural component contains implications for different forms of self-government and autonomy. The procedural component is equally important: it implies the right to negotiate as equals for a controlling interest in those structures.[46]

The process of implementation also deals with who is to have the right to negotiate and, as well, the physical and jurisdictional boundaries for the new entity being created. Of course, implementation is not politically divorced from the structural component but pragmatically may be viewed apart for purposes of analysis.

If completely independent nationhood is not the status sought, of initial importance is the question of where the new entity is to be placed jurisdictionally within the constitutional structure of the existing polity. Reference has already been made to the Canadian negotiations designed to create two new indigenous entities, one hived off from the Northwest Territories to form the self-governing territory of Nunavet but remaining under the Canadian federal government, and the other to exist geographically dispersed within the Yukon in the form of fourteen separate reserves, but additionally exercising powers and bearing responsibilities of the Yukon government.[47] In the case of Hawai'i, some participants in the sovereignty movement contest the legitimacy of the present State of Hawai'i and so are not amenable to action that would purport to have the state's constitution as the instrument creating a self-governing Hawaiian entity.

It should be noted here that Hawai'i's constitution already makes provision for a degree of indigenous self-governance and also identifies land dedicated to the welfare of Hawaiians. The Office of Hawaiian Affairs (OHA), almost a fourth branch of government, run by a board of indigenous Hawaiians elected solely by them, manages OHA assets for their benefit.[48] Another agency, the Department of Hawaiian Home Lands—whose history as the Hawaiian Homes Commission goes back to territorial days and was folded into the state constitution at statehood—administers 200,000 acres of homestead lands set aside by the U.S. Congress for Native Hawaiians. With careful attention to the nuances of the terminology chosen, for this is a sensitive

matter to many of those now benefiting under these constitutional provisions, it is not inconceivable that these two existing agencies and their assets may be merged into a new indigenous entity by constitutional amendment that would also incorporate supplementary governing structure for the new entity. However, without federal action recognizing both the new entity and ratifying the state's transfer of the trust obligations already imposed on it under federal law, such a scenario would face certain objection by most proponents of Hawaiian sovereignty.

As noted, one of the practical questions that must be resolved is identifying the discrete geographical area to be encompassed within the territorial boundaries of the indigenous entity. The Canadian negotiations conveniently furnish examples of two different approaches, one carving out a contiguous territory and the other specifying dispersed areas for inclusion within the new entity. Because the Hawaiian monarchy once claimed jurisdiction over islands no longer within the state's boundaries, some sovereignty advocates demand that these islands be included within any restored Hawaiian nation, again making Hawai'i whole. When the U.S. government returned the island of Kaho'olawe to state jurisdiction, after long keeping it off-bounds for use for target practice over the protest of Hawaiians objecting to the despoiling of an area traditionally held sacred, the Hawai'i State Legislature directed—by statute—that the island be transferred in the future to the "sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai'i."[49] The symbolism of this action resonated loudly within the sovereignty movement. Whatever the future may bring, one area destined to be included within a Hawaiian nation has thus already been identified, even before any formal negotiations on this possibility have opened.

The procedure of determining who is qualified to negotiate for self-determination can be fraught with complexity, as illustrated in Hawai'i. Under the monarchy, non-indigenes could be citizens and possess voting rights, so a few in Hawai'i propose that people other than indigenous Hawaiians should be able to participate fully in the sovereignty movement if they are so inclined. This position does not appear to command strong support in the sovereignty movement, and is to be distinguished from recognition of the pragmatic need at some stage in the formation of a Hawaiian nation for non-indigenous citizens of Hawai'i to be involved in shaping the changes proposed insofar as they will be affected.

The converse of this—limiting participation solely to indigenes—also is not a simple matter to resolve, particularly in Hawai'i. At the outset, a unique complication introduced by the U.S. Congress highlights the more generic question of whether part-blooded indigenes are to be considered qualified to participate. Congressional statute has muddied the waters by introducing

a definition of "Native Hawaiian"—one must be of at least 50 percent Hawaiian ancestry to be eligible to receive certain designated benefits, such as homestead leases. Since this much smaller group has been singled out by the federal government and may be the most negatively affected, is participation to be restricted just to Native Hawaiians, or are they to be protected by assuring them of at least concurrent majority rights so they can veto whatever may be negotiated by other Hawaiians if they disapprove? And if the eligible group is expanded to include all persons of indigenous Hawaiian ancestry, no matter how minuscule their blood quantum, may it still be geographically limited by requiring residence or even physical presence in the Hawaiian Islands to vote? Two referendums, one conducted in 1996 by the Hawaiian Sovereignty Elections Council, a body created by the Hawai'i State Legislature, and another in 1999 under nongovernmental auspices, allowed to vote all persons claiming any Hawaiian ancestry under oath, whether or not a citizen of the state or the United States and regardless of residence. Since there are likely more persons of Hawaiian ancestry outside of the state —and maybe outside of the United States—than within, the potential universe of participants was daunting. However, the 1996 referendum drew only a scattering of responses from Hawaiians outside of the state[50] and the 1999 vote, due to a small turnout, apparently even fewer. Hawai'i's experience from this falls squarely within the standards for resolving the implementary question of who is to be deemed qualified to participate as an indigene: self-identification as being indigenous (group consciousness) and group recognition as one of its members (group acceptance). Beyond this, political discourse must resolve all else.

Two final matters of implementation remain for consideration. One concerns whether a satisfactory range of status choices is being offered to indigenes. The other raises the question: When people other than indigenes participate in registering choice, are the indigenes to enjoy concurrent majority powers, that is, the ability to ratify or reject the final product regardless of a non-indigenous vote approving it?

If only a limited range of choices is permitted, as in Hawai'i where the vote on statehood was either approving statehood or (inferentially, at that time) perpetuating territorial status by voting no, dissatisfied indigenous voters who disapprove of both may logically raise the objection that they were denied full opportunity for self-determination. However, when the dissatisfied assert that the range of choices available should have specifically included the option of independence, they are on disputatious grounds. In the negotiations with the Micronesians prior to the agreement on free association, the United States adamantly refused to include independence as one of the negotiable options. Notwithstanding, the United Nations approved

the termination of the trust territory and admitted the three new Micronesian polities into membership.

The majority of those who participated in drafting Hawai'i's state constitution were non-indigenous; the same applied when later constitutional conventions proposed amendments. Hawaiian indigenes comprised minorities of all those who could vote on both constitution and amendments. To the extent that this involved matters peculiarly relevant to indigenous Hawaiians, provisions may have been adopted of which they disapproved but on which they were outvoted. No institutional mechanism existed to separately record the indigenous position on any such provision nor to encourage continued dialog toward resolution when material disagreement was disclosed. In the absence of any such arrangements, the whole process is vulnerable to the charge that it constitutes a denial of self-determination.

On reviewing Hawai'i's experience in becoming a state, and contrasting the heady euphoria of that period with the stridency of Hawaiian sovereignty movement advocates for self-determination, it seems to this commentator that the difference can primarily be attributed to a changed view in democratic polities about their indigenous populations and the latter's claim of inherent rights. Assimilation no longer provides the pattern by which all policy is to be cut. Modern petitions and demonstrations—witness the setting up of the Aboriginal tent embassy on the lawn of Parliament in Canberra to embarrass the Government[51] or the more recent massing of Hawaiians on the 'Iolani Palace grounds in the center of Honolulu to protest the overthrow of the monarchy and Hawai'i's admission into the American Union a full century ago—provide ample proof that political leaders and organized politics must now anticipate and accommodate indigenous efforts aimed at securing self-determination. If repetition is to be avoided "Down Under" of the challenge that has already been raised in Hawai'i, Aborigines must be afforded opportunities of involvement in ways appropriate to expression of their varied desires for self-determination.

## Coda

This article was prepared for submission in late 1998. In the interim, on 3 October 1998, a referendum was held on the question: "Now that a constitution for a State has been . . . endorsed by the Northern Territory Parliament . . . Do you agree that we should become a state?" Among other provisions, the proposed constitution called only for future "harmonisation of the customary law with other law in force," including matters of Aboriginal governance, and that through negotiations and consultations.[52] A bare majority of 51.3 percent voted no, which has been interpreted not as the rejection of the

notion of statehood per se, but to uncertainty over relations with the commonwealth government and disagreement over the provisions of the proposed constitution. Significantly, the urban area (predominantly non-Aboriginal) was two-thirds opposed.[53]

Later, after the Standing Committee on Legal and Constitutional Affairs of the Legislative Assembly of the Northern Territory was instructed to inquire into measures for facilitating statehood, it found the Aboriginal position desired that distinct from—and prior to—considering statehood, a "framework agreement" be negotiated "aimed at addressing the social and economic disadvantages of Aborigines." In its report the committee recommended that "the Northern Territory Government commence discussions as soon as possible to explore the development of a framework agreement." It also recommended that "specific priority be accorded to commencing the process of recognition and integration of Aboriginal customary law within the broader legal system" and this need not "await the re-commencement of the Statehood process."[54]

## NOTES

1. Norman Meller, *With an Understanding Heart: Constitution Making in Hawaii* (New York: National Municipal League, 1971).

2. Paul C. Bartholomew and Robert M. Kamins, "The Hawaiian Constitution: A Structure for Good Government," *American Bar Association Journal* 45, no. 11 (November 1959): 1145.

3. Actually this was not revolutionary: fifteen territories had held state constitutional conventions without the U.S. Congress previously having adopted statehood-enabling legislation.

4. The Hawaii Territorial Legislature from 1901 until the mid-1920s had a majority of indigenous Hawaiian members in each of its two houses. Then legislators of *haole* or Portuguese ancestry became the largest component, subsequently followed by those of Asian ancestry. Both legislative houses have always included indigenous Hawaiian members. See Norman Meller, "Centralization in Hawaii," Ph.D. thesis, University of Chicago, 1955: 281–283, table 9, "Ethnic Composition of Legislature (Territory of Hawaii)."

5. For distinction between the two rights of self-determination, see Jon M. Van Dyke, Carmen D. Amore-Siah, and Gerald W. Berkeley-Coats, "Self-Determination for Non-self-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i," *University of Hawai'i Law Review* 18, no. 2 (Summer/Fall 1996): 623–643. For Hawai'i, see also Noelle M. Kahanu and Jon M. Van Dyke, "Native Hawaiian Entitlement to Sovereignty: An Overview," *University of Hawai'i Law Review* 17, no. 2 (Fall 1995): 427–462.

6. Christine Fletcher, *Aboriginal Politics* (Carlton, Vic.: Melbourne University Press, 1992), 1.

7. Only by 1965 had all states and territories in Australia awarded Aborigines the right to vote. C. D. Rowley, *Outcasts in White Australia,* 2d edition (Ringwood: Penguin, 1972), 401, 415. It required a federal referendum in 1967 to count Aborigines in the Australian census. Kingsley Palmer, "Government Policy and Aboriginal Aspirations," in Robert Tonkinson and Michael Howard, eds., *Going It Alone* (Canberra: Aboriginal Studies Press, 1990), 166.

8. Peter Read, "Northern Territory," in Ann McGrath, ed., *Contested Ground* (St. Leonard's, N.S.W.: Allen & Unwin, 1995), 296.

9. Norman Meller and Anne Feder Lee, "Hawaiian Sovereignty," *Publius: The Journal of Federalism* 27, no. 2 (Spring 1997): 170.

10. Lilikalā Kameʻeleihiwa, *Native Lands and Foreign Desires* (Honolulu: Bishop Museum Press, 1992); John Chinen, *Great Mahele, Hawaii's Land Division of 1948* (Honolulu: University Press, 1958).

11. As illustration, no reference was made to the Aboriginal Convention, which in 1993 called on the Northern Territorial government to suspend further consideration of the territory's becoming a state until Aborigines reached agreement. Heather Brown and Darryl Pearce, "National Aboriginal Constitutional Convention Report," in Christine Fletcher, ed., *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994), 107–110.

12. Meller and Lee, "Hawaiian Sovereignty," 199.

13. Actually, on consulting the holdings of the Hamilton Library, University of Hawaiʻi, it was found that comparable challenges are already being readied in Australia. For example, see Fletcher, *Aboriginal Self-Determination.*

14. Tom Coffman, *Nation Within* (Honolulu: Epicenter, 1996); Haunani-Kay Trask, *From a Native Daughter* (Monroe, Me.: Common Courage Press, 1993); Haunani-Kay Trask, "Hawaiians, American Colonization, and the Quest for Independence," *Social Process in Hawaii* 31 (1984/1985): 122; Noel J. Kent, *Hawaii: Islands under the Influence* (New York: Monthly Review Press, 1982).

15. Asbjorn Eide, "Internal Conflicts under International Law," in Kumar Rupesinghe, ed., *Ethnic Conflict and Human Rights* (Tokyo: United Nations Press, 1994), 27.

16. Russell Barsh, "Indigenous Peoples: An Emerging Object of International Law," *American Journal of International Law* 80 (1986): 373.

17. Article 31, in the draft contained in annex to Resolution 1994/95 of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection of Minorities, entitled "Draft United Nations Declaration on the Rights of Indigenous Peoples" (E/CN. 4/1995/2–E/CN.4/Sub. 2/1994/56), 113.

18. Barsh, "Indigenous Peoples," 173.

19. Ranginui J. Walker, "Colonization and Development of the Maori People," in Michael C. Howard, ed., *Ethnicity and Nation-Building in the Pacific* (Tokyo: United Nations University, 1989), 152.

20. Peter Larmour, "Alienated Land and Independence in Melanesia," in Institute for Polynesian Studies, *Proceedings of the 1982 Politics Conference: Evolving Political Cultures in the Pacific Islands* (Lā'ie, Hawai'i: Brigham Young University–Hawai'i Campus, 1982), 216–218.

21. Hans Dagmar, "Banabans in Fiji: Ethnicity, Change, and Development," in Howard, *Ethnicity and Nation-Building,* 198.

22. Eide, "Internal Conflicts under International Law," 28. Frequently used as a working definition for the purposes of international action is the formulation of Jose R. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (U.N. ESCOR, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN. 4/Subd. 2/1986/7/Add. 4), par. 379–81.

23. See generally Eugene Ogan, "The Bougainville Conflict: Perspectives from Nasioi," discussion paper, *State Governance Melanesia* 49, no. 1 (1998) (Canberra: Research School of Pacific and Asian Studies, Australian National University); and Jill Nash and Eugene Ogan, "The Red and the Black: Bougainvillean Perceptions of Other Papua New Guineans," *Pacific Studies* 13, no. 2 (1990): 1–17.

24. H. C. Coombs, *Aboriginal Autonomy: Issues and Strategies* (Melbourne: Cambridge University Press, 1994), 19.

25. Ann McGrath, ed., *Contested Ground* (St. Leonard's, N.S.W.: Allen & Unwin, 1995), 19.

26. Coffman, *Nation Within,* 272–287.

27. Reported on in *Honolulu Star-Bulletin,* 11 August 1998: A-1.

28. *U.S. Statutes at Large,* vol. 107, part 2: 1510–1513. See Bradford H. Morse and Kazi A. Hamid, "American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine," *Connecticut Journal of International Law,* 5 (Spring 1990): 407–456.

29. The constitution of Ka Lahui Hawai'i (the Nation of Hawai'i), probably the largest organized sovereignty movement group, recognizes as a symbolic monarch Kalokuokamile II, providing continuity with the Hawaiian monarchial tradition.

30. Paul G. McHugh, *The Maori Magna Carta: New Zealand and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991).

31. *Mabo* v. *State of Queensland* (1992), 66 ALJF 408.

32. Richard H. Houghton III, "An Argument for Indian Status for Native Hawaiians—The Discovery of a Lost Tribe," *American Indian Law Review* 14 (1989): 21–23.

33. Stuart M. Benjamin, "Equal Protection and the Special Relationship: The Case of Native Hawaiians," *Yale Law Review* 106 (December 1996): 537–612.

34. *Rice* v. *Cayetano,* a case before the U.S. Supreme Court, holds the Fifteenth Amendment precludes limiting Office of Hawaiian Affairs elections to only Hawaiians, and may necessitate action to resolve the issue.

35. *Public Access Shoreline Hawai'i* v. *Planning Commission* (1993), 79 Haw. 246.

36. Anne Feder Lee, *The Hawaii State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1990), 67.

37. Coombs, "Aboriginal Autonomy," 200–218.

38. Tonkinson and Howard, *Going It Alone,* 68.

39. Guam Commission on Self-Determination, "Changing Our Political Status: Commonwealth Now," advertising supplement to *Pacific Daily News,* 27 October 1997.

40. Meller and Lee, "Hawaiian Sovereignty," 177–181. For another survey of forms taken by the Hawaiian sovereignty movement, see Samuel P. King, "Hawaiian Sovereignty," *Hawai'i Bar Journal* 3, no. 7 (July 1999): 6.

41. Garth Nettheim, "International Law and Sovereignty," in Fletcher, *Aboriginal Self-Determination,* 71–84.

42. Paul Tennant "Strong Promises on Paper: Treaties and Aboriginal Title in Canada," in Fletcher, *Aboriginal Self-Determination,* 177–190.

43. Peter Reed, "Northern Territory," in McGrath, *Contested Ground,* 296–297.

44. Norman Meller, *Constitutionalism in Micronesia* (Lā'ie, Hawai'i: Institute for Polynesian Studies, 1985), 319.

45. William A. Galston and Geoffrey L. Tibbetts, "Reinventing Federalism: The Clinton-Gore Program for a New Partnership among the Federal, State, Local, and Tribal Governments," *Publius: The Journal of Federalism* 24, no. 2 (Summer 1994): 23–48.

46. Cliff Walsh, "Insights and Overviews," in Fletcher, *Aboriginal Self-Determination,* 194.

47. Russell Mathews, "Reconciliation of All Australians: Towards Aboriginal Self-Government," in Fletcher, *Aboriginal Self-Determination,* 199–200.

48. Lee, *Hawaii State Constitution,* 177–179. Also see n. 34 above.

49. *Hawaii Revised Statutes,* Sect. 6K–9, 1933 Suppl.

50. Meller and Lee, "Hawaiian Sovereignty," 183 n. 69.

51. H. Collins, "Aborigines and Australian Foreign Policy," in C. Bell, H. Collins, J. Jupp, and W. D. Rubinstein, *Ethnic Minorities and Australian Foreign Policy* (Canberra: Dept. of International Relations, Australian National University, 1983), 198.

52. Report of the Statehood Convention of the Northern Territory, Schedule of Alterations to Final Draft Constitution: Resolution 6, Clause 2.1.1.

53. Communication of Ms. Julie Nickolson, Executive Officer, Standing Committee on Legal and Constitutional Affairs, Legislative Assembly of Northern Territory, 7 May 1999.

54. Recommendation 3, Executive Summary and Recommendations, Report of the Standing Committee on Legal and Constitutional Affairs: 27 April 1999. On Internet: www.nt.gov./lant/committees/.