No ke Ola Pono o ka Lāhui Hawai'i:
The Protection and Perpetuation of Customary and Traditional Rights as a Source of Well-Being for Native Hawaiians

Paul F. Nahoa Lucas

Of the many federal and state laws enacted to promote Hawaiian well-being, the most crucial for overall quality of life and self-sufficiency are those laws that protect the ability of Native Hawaiians to exercise traditional practices that are rooted firmly in the Hawaiian language and culture. This article outlines the legal bases for the exercise of customary and traditional rights for Native Hawaiians and suggests that through the protection of such rights, Native Hawaiians can further their well-being in today's society by continuing to maintain their self-respect and identity as indigenous people. However, more than laws are needed to successfully perpetuate traditional Hawaiian rights and practices; other key issues include practitioners' knowledge about the existence of these rights, as well as the sustainability of the land, ocean, and natural resources on which these rights are exercised.

CORRESPONDENCE MAY BE SENT TO:
Paul F. Nahoa Lucas, Education Legal Division, Kamehameha Schools,
567 South King Street, Suite 310, Honolulu, Hawai'i 96813.
Email: palucas@ksbe.edu

Hūlili: Multidisplinary Research on Hawaiian Well-Being Vol. 1 No.1 (2004)

How does one define the term *well-being*? Webster's Dictionary (Second College Edition) defines it as "the state of being well, happy, or prosperous; welfare." The Hawaiian words for well-being are *ola, maika'i, pono,* and *ahona.* There are many federal and state laws that we would consider as being enacted for the well-being of Native Hawaiians because they (a) establish a public trust corpus that either generates revenues from public lands for Hawaiian programs or allows homesteading by Native Hawaiians at nominal lease rent,[1] (b) appropriate public funding for programs in the areas of health, education, or social welfare,[2] or (c) provide a framework for achieving political self-governance similar to those given to other Native Americans residing within the United States.[3]

While all of these laws contribute to improving the well-being of Native Hawaiians, they do not provide for the self-sufficient needs of Native Hawaiians as much as those laws that protect and perpetuate the ability of Native Hawaiians to exercise customary and traditional practices that are rooted firmly in the Hawaiian language and culture. Through the protection of the rights embodied in traditional and customary laws, Native Hawaiians can continue to maintain their own identity and self-respect as indigenous people and thus further their well-being in today's society.

Traditional Hawaiian Land Tenure System

Traditional land tenure in Hawai'i was based on a subsistence economy, with the primary unit being the *ahupua'a,* a division of land that ran from the sea to the mountains, which enabled natives within it to obtain virtually all things necessary for survival. As one early Hawaiian land case described life in the ahupua'a, this division of land afforded

> [T]he chief and his people a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate

> land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top. (*In Re Boundaries of Pulehunui*, 1879)

For more detailed accounts of these subsistence activities see, for example, Pukui and Handy (1978). As one Court further explained,

> [C]ommoners were permitted to cultivate lands within the ahupuaʻa in exchange for services to the King and the ruling chief (if the ahupuaʻa were not reserved for the King himself). The well-being of ruler and ruled was thus intertwined and the use of undeveloped lands by commoners for subsistence and culture was to the benefit of all. (*Kalipi v. Hawaiian Trust Co., 1982*, at 6–7)

Cultivation of *loʻi kalo*, or irrigated taro terraces, and surrounding *mālaʻai*, or cultivated fields, was described by one noted ethnobotanist as a "highly advanced stage of gardening" (Handy & Handy, 1972, p. 14). Hawaiians were keenly aware of their surroundings and intensively managed and exploited the interrelationships between the various harvesting and spawning cycles of plants and animals. As Lam (1989) noted:

> While to the untutored Western eye, then, Hawaiians may have appeared to use only those lands that were under cultivation, which may have amounted to as little as one per cent of the island's surface, in reality the islanders exploited a much wider terrain.

The overarching goal, however, was to protect and ensure the continuation of a valuable resource. As noted by Titcomb (1983):

> To conserve the supply of all resources was constantly in the Hawaiian mind. When plants were taken from the forest, some were always left to replenish the supply. Replanting was done without fail at the proper time as beds of taro and sweet potatoes were used. Fishing grounds were never depleted, for the fisherman knew that should all the fish be taken from a special feeding spot (ko'a) other fish would not move in to replenish the area. When such a spot was discovered it was as good luck as finding a mine, and fish were fed sweet potatoes and pumpkins (after their introduction) and other vegetables so that the fish would remain and increase. When the fish became accustomed to the good spot, frequented it constantly, and had waxed fat, then the supply was drawn upon carefully. Not only draining it completely was avoided, but also taking so many that the rest of the fish would be alarmed. At the base of this action to conserve was the belief that the gods would have been displeased by greediness or waste. (pp. 12–13)

Use of resources within the ahupua'a, which included the adjoining fishery, was regulated using highly complex and sophisticated kapu, or rules that were based on conservation ethic, religion, and, at times, personal interest. Many of these kapu varied from one locale to the other, depending on the conditions of the area. Respected author Mary Kawena Pukui offered a glimpse into the local kapu placed in traditional times on fishing areas in her hometown of Ka'ū, Hawai'i:

> There was never a time when all fishing was tabu [kapu]. When inshore fishing was tabu, deep sea fishing was permitted, and vice versa. Summer was the time when fish were most abundant and therefore the permitted time for

> inshore fishing. Salt was gathered at this time also, and large quantities of fish were dried. Inland crops were tilled, and supplies from the higherlands procured. In winter, deep sea fishing was permitted, and the sweet potatoes that grew in large patches near the shore were cultivated. A tabu for the inshore fishing covered also the growths in that area, the seaweeds and shell fish as well as the fish. When the kahuna had examined the inshore area, and noted the condition of the animals and plant growths . . . [were mature and had become established] . . . he so reported to the chief of the area and the chief ended the tabu. (Titcomb, 1983, p. 14)

Once the kapu was lifted, however, the area was not opened for immediate use by everyone. For several days after the kapu was lifted, the chief had the prerogative of reserving all of the seafood gathered, for himself and his household/retinue. After that, the *konohiki* (land agent or landlord) took his share, and finally, the area was open to all (Titcomb, 1983, p. 14).

Changes in the Traditional Hawaiian Land Tenure System after Western Contact

Hawaiian land tenure and the communities that support such agrarian-based subsistence systems have been under siege since the arrival of Captain James Cook in 1778. The displacement and disenfranchisement from the land accelerated rapidly from the transformation of a traditional land tenure system to a Western system of private ownership after the Mahele of 1848 (the division of lands and acquirement of real estate by individuals), and such displacement continued at an alarming rate after the overthrow of the Hawaiian monarchy and throughout Hawai'i's territorial period (Lam, 1989, pp. 214–218; Pukui & Handy, 1978, pp. 225–252). Compounding the problem were the Western legal principles of trespass and adverse possession to further restrict access for practitioners. Indeed, evidence of such hardship is contained in various letters written by Hawaiians to the govern-

ment asking for intervention in landowners' unscrupulous tactics, some even by the Hawaiian konohiki themselves (see, e.g., Selected Letters From the Land File, 1846–1851). One such letter illustrative of this plight was written in August 1851 by Hio on behalf of some 54 Hawaiians, complaining to their local legislator of the acts of their local landlords:

> We are in trouble because we have no firewood and no lā'ī [ti leaf], and no timber for houses, it is said in the law that those who are living on the land can secure the things above stated, this is all right for those living on the lands which have forests, but, we who live on lands which have no forests, we are in trouble. The children are eating raw potato because of no firewood, the mouths of the children are swollen from having eaten raw taro. We have been in trouble for three months, the Konohikis with wooded lands here in Kaneohe have absolutely withheld the firewood and lā'ī and the timber for houses. (Letter from Hio et al. to House of Representatives, 1851)

The Hawaiian Community Today

Today, rural Hawaiian communities such as Ke'anae-Wailua and Kahakuloa on the island of Maui, Miloli'i in South Kona and Kalapana in the Puna district of the Big Island, continue to maintain subsistence lifestyles practiced by their *kūpuna* (elders) primarily because these communities, in their remote location, have been spared the extensive commercial development that has plagued more easily accessible areas. (For a description of the persistence of the Hawaiian subsistence lifestyles through the 1920s in Hāna and Ke'anae districts, see McGregor, 1989, pp. 369–378.) These surviving rural communities serve, according to McGregor (1989), as "cultural *kīpuka*" for the Hawaiian people. In geologic and geographical terms, a *kīpuka* is an area of land encircled by a volcanic lava flow. Many kīpuka can be seen while touring the Hawai'i Volcanoes National Park. Kīpuka contain a diverse and highly stratified mix of native Hawaiian plants, birds, insects, and

other animals, serving as a seed bank to repropagate the surrounding lava flow with native vegetation. Cultural kīpuka, like their geological counterpart, can serve to repropagate other areas of the Hawaiian community that have lost or are devoid of their Hawaiian culture (McGregor, 1989, chaps. 7–9).

Customary and Traditional Practices as a Source of Well-Being for Native Hawaiians Today

There are immeasurable health and economic benefits that result from protecting and perpetuating the subsistence, cultural, and religious practices of Native Hawaiians. For many modern rural Hawaiian communities, subsistence practices allow low-income families to supplement their income with products from the ocean and uplands, thereby improving their chances for survival and overall well-being. (For an excellent discussion of the benefits of traditional subsistence practices on a modern island economy, see Molokaʻi Subsistence Task Force, 1994.) Critical to the survival of these subsistence activities is the ability to access the shoreline to fish, gather *limu* (seaweed), shellfish, and other marine products, or to hunt upland for wild pig, goat, or deer, or to pick ti leaves, fruit, *olonā* (native shrub used to make cordage), *māmaki* (native shrub or tree; leaves used for tea), and other medicinal plants. Kūpuna often refer to the ocean affectionately as "their refrigerator" and to the uplands as "their bread basket."

For many urban Hawaiians, it took a whole generation to realize that the traditional Hawaiian diet consisting of low-fat/low-protein, high-carbohydrate foods prepared fresh are a key ingredient to *ke ola pono*, or living the proper way, to good nutrition and health, the same as our kūpuna lived for generations. With the myriad of health problems plaguing the Hawaiian population today, more emphasis should be placed not only on educating Hawaiians of the benefits of living a healthy lifestyle, but on the important contributions that the traditional lifestyle of the kūpuna played in developing a healthy lifestyle, physically, mentally, and spiritually. To be sure, modern health professionals are only now beginning to discover a causal link between adopting the values that underlie a traditional lifestyle and well-being (Hughes, 2001; Leslie, 2001; Mokuau, Hishinuma, & Nishimura, 2001).

In addition, there are important social benefits as well, such as the strengthening and support of *'ohana* (family) and other Hawaiian societal values. As one study examining the subsistence practices on the island of Moloka'i found:

> Beyond the direct resource and material rewards resulting from a subsistence economy are cultural benefits that are critical to community and family well-being. A subsistence economy emphasizes sharing and redistribution of resources which creates a social environment that cultivates community and kinship ties, emotional interdependency and support, prescribed roles for youth, and care for the elderly. Emphasis is placed on social stability rather than individual efforts aimed at income generating activities. We found in our study that large families were more dependent than smaller families on subsistence resources and all members who were old enough played a role in gathering resources. When a resource was caught or gathered in large quantities during certain seasons, it was common practice to share with 'ohana or community members. The *kūpuna* were especially reliant upon the process of sharing and exchange because many were not able to engage in strenuous physical activities associated with subsistence. In their earlier years, they were benefactors in this same process. Subsistence, as a process of sustainable development, is a value-laden economic system that places emphasis on social relations over exponential growth rates. (Moloka'i Subsistence Task Force, 1994, pp. 93–94)

Challenges to Continue "The Hawaiian Lifestyle" in Hawaiʻi

Over the years, notwithstanding other activities, such as drug use, that negatively impact Hawaiʻi's rural community, our well-being has been jeopardized by obstacles that either prevent or discourage Hawaiians from accessing natural resources for subsistence, cultural, and religious purposes. Too often Hawaiians have been denied access to the shoreline or a *ma uka* (upland) trail because a ranch, sugar plantation, or other large landowner has built a fence across or bulldozed an ancient trail or government road used by the community for access. Hawaiians have been intimidated from exercising their rights by landowners unreasonably delaying or refusing permission, or threatening criminal prosecution for crossing private lands to access a cultural resource. Although ranches and plantations have been replaced with luxury home development, golf courses, and hotels, the problems and issues remain the same. Some would even argue that access and gathering issues are becoming more sophisticated and complex. While landowners and developers, forced to recognize through years of litigation that the public, including Native Hawaiians, has the right of access to the shoreline and the uplands, have managed to attach their own "conditions," making it more difficult for Hawaiians to exercise their rights. A good example: The developer agrees to provide access to the shoreline but limits the number of parking stalls available to the public. If the shoreline is miles from a public road, such as in the case of the ʻIhilani Resort Hotel and Spa at the Ko ʻOlina resort on Oʻahu, the developer is able to claim that public access is provided, nonetheless lawfully restricting the number of locals occupying the shoreline at any one time. Compounding these problems is Hawaiians' own nonconfrontational nature of dispute resolution, which holds, as one of its values, respect for authority. Thus, Hawaiians will typically not confront or engage a security officer, ranch foreman, or plantation *luna* (supervisor, more often than not a Native Hawaiian) who resists a request for access. As more development occurs, and as more pressure is being placed on traditional resources, Hawaiians are being faced with the difficult question of whether to abandon such practices or struggle to continue, despite the obstacles. Thirty years ago, it may have been acceptable to travel a mile or two down the road to access a favorite beach or trail for fishing or hunting. These days, however, Hawaiians may be forced to travel miles to the other side of the island, or even another island, to find a resource that has been depleted in their traditional area. The future does not appear to hold much promise either. When these resources are completely depleted, Hawaiians may be

forced to accept their traditional foods from imported sources, such as purchasing fresh frozen *'ama'ama* (mullet) from New Zealand or taro shipped from Sāmoa. Many people doubt that this scenario could ever happen, but we are already seeing the effects.

Sources of Customary and Traditional Rights

The Kuleana Act (H.R.S. Section 7-1)

There are three sources of rights that Native Hawaiians can use under state law to further their well-being in exercising their customary and traditional practices. The first law is found in Hawai'i Revised Statutes section 7-1. Section 7-1 was originally enacted as part of the Act of August 6, 1850, now popularly referred to as the "Kuleana Act" because it established the process by which the *maka'āinana*, or commoners, could establish title to house lots and taro patches they had made claim for during the Mahele of 1848. Over the years, all portions of the Kuleana Act were repealed, with the exception of section 7-1, which gives certain limited rights to owners of *kuleana* (small parcel of land awarded in 1850), including the right to access their kuleana, to obtain water from springs or streams and to gather certain articles such as *lā'ī* (ti leaf), *aho* (cordage), *pili* (twisted beardgrass used for thatching), house timber, and firewood within the boundaries of their ahupua'a. The current version of section 7-1 states:

> 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 well and watercourses, which individuals have made for their own use.

As the courts later noted, the rights set forth in section 7-1 contain two types of rights: (a) "gathering rights which are specifically limited and enumerated" and (b) "rights to access and water which are framed in general terms" (*Kalipi v. Hawaiian Trust Co.*, 1982). All of these rights were given to the makaʻainana when Kauikeauoli (Kamehameha III) signed the Kuleana Act into law in 1850, with the explicit understanding that "a little bit of land even with allodial title, if they [the people] be cut off from all other privileges would be of very little value" (*Privy Council Records*, 1850). As the courts later concluded the gathering rights of section 7-1 "were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways . . . [and] thus remain . . . available to those who wish to continue those ways" (*Kalipi v. Hawaiian Trust Co.*, 1982, at 9). Interestingly, section 7-1 as originally enacted required the consent of the konohiki, prior to the exercise of such rights, but such consent provision was eliminated the following year because "many difficulties and complaints have arisen from the bad feeling existing on account of the Konohiki's forbidding the tenants on the lands enjoying the benefits that have been by law given them" (Letter from Hio et al. to House of Representative, 1851 at 98).

The Hawaiian Usage Exception (H.R.S. Section 1-1)

The second source of rights is found in Hawaiʻi Revised Statutes section 1-1, commonly referred to as the "Hawaiian Usage" exception. This law was enacted in November 1892 and signed into law by Queen Liliʻuokalani, less than two months before the overthrow of the Hawaiian monarchy in January 1893. The statute expressly states that the common law of England shall be the law of the land, "except as. . . fixed by Hawaiian judicial precedent or established by Hawaiian usage." As interpreted by the courts, this phrase

> represents an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. (*Kalipi v. Hawaiian Trust Co., 1982, supra*, at 10–11)

Thus, section 1-1 has been applied to encompass other traditional and customary practices that are not expressly enumerated under H.R.S. section 7-1. This concept of "native understandings and practices" was akin to the English doctrine of custom, "where practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law" (*Kalipi, 1982, supra*, at 10–11). The courts were careful to point out that not all of the elements necessary to establish the English doctrine of custom were incorporated into section 1-1 (*Kalipi*, 1982, *supra*, at 10–11). For example, the Courts have rejected the English doctrine that the custom must exist from "time immemorial" and have instead allowed the custom to be established as of November 25, 1892, the date of enactment of section 1-1 (*Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 1995). In all cases, the Court pointed out that "the precise nature and scope of the rights retained by 1-1 would, of course, depend upon the particular circumstances of each case" (*Kalipi, supra*, at 10–11).

An analysis of two cases interpreting section 1-1 shows that evidence of the actual custom exercised in a particular area will dictate the nature and extent of the right being exercised. For example, in *Kalipi*, the Court allowed lawful "occupants" within the boundaries of the ahupua'a to access lands within the ahupua'a boundaries for items enumerated in section 7-1. As the Court explained: "By 'lawful occupants' we mean persons residing within the ahupua'a in which they seek to exercise their gathering rights" (*Kalipi*,1982, *supra*, at 8). Kalipi was denied rights of access and gathering because he did not live in the ahupua'a and thus there was "an insufficient basis to find that such rights would, or should accrue to persons who did not actually reside within the ahupua'a in which such rights are claimed" (*Kalipi*, 1982, *supra*, at 12). Ten years later, the Court in *Pele Defense Fund v. Paty* (1992) held that customary and traditional rights "may extend beyond the ahupua'a in which a native Hawaiian resides" based on evidence of "the traditional access and gathering patterns of native Hawaiians in the Puna region," which showed that practitioners

from abutting ahupuaʻa would hunt and gather in a common upland area that served as a communal hunting ground for residents of the lower ahupuaʻa. Also, previous to *Pele Defense Fund*, the belief was held by courts and the public that the benefits of access and gathering were limited to the individual choosing to exercise such right. The *Pele Defense Fund* showed that it was customary for individual practitioners who hunted and gathered in the forest to return and share these products with their extended ʻohana, either family or close friends, thereby increasing the class of people who benefited from the exercise of such rights (Findings of Fact and Conclusions of Law; Order filed 8/26/03 in *Pele Defense Fund v. Estate of James Campbell*, Civ. No. 89-089, Hilo, at 15). Further, what was shown in *Pele Defense Fund* was that family and friends would accompany and assist practitioners in the exercise of their rights (*Pele Defense Fund v. Estate of James Campbell*, at 19). Accordingly, the lower court's Order in *Pele Defense Fund* was crafted to expand the class of persons possessed of traditional and customary rights to include family and friends who assist the practitioner in the exercise of his or her rights (*Pele Defense Fund v. Estate of James Campbell*, at 34).

Article 12, Section 7 of the Hawaiʻi State Constitution

The third source of rights is set forth in article 12 section 7 of Hawaiʻi's state constitution. Ratified as an amendment to the constitution by the voters of Hawaiʻi following the state constitutional convention in 1978, section 7 states that:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa 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.

The Convention proceedings illuminate the concern for including such provision into the state constitution:

> Your Committee decided to add this section to the Constitution in order to reaffirm, for descendants of native Hawaiians, rights customarily and traditionally exercised for subsistence, cultural, and religious purposes. Aware and concerned about past and present actions by private landowners, large corporations, ranches, large estates, hotels, and government entities which preclude native Hawaiians from following subsistence practices traditionally used by their ancestors, your Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights. (Stand. Comm. Rep. No. 57, reprinted in Proceedings of the Constitutional Convention of Hawai'i of 1978, 640)

And in drafting section 7, the framers made it clear that they "intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court" (Stand. Comm. Rep. No. 57).

It is important to point out here that case law interpreting Article 12 section 7 has determined that this section does not create any new rights, but merely reaffirms rights that exist under current state law, that is, sections 7-1 and 1-1 (*Pele Defense Fund v. Paty*, 1992). It is equally important to note that the passage of Article 12 section 7 by Hawai'i's voters represents that the people of Hawai'i have determined that the exercise of customary and traditional rights are now deserving of constitutional protection, elevating these rights to a level enjoyed by other individual freedoms cherished under America's Bill of Rights, such as the right of expression, association, or protection against unreasonable searches and seizures. Indeed, Article 12 section 7 gives Native Hawaiians the respect they deserve when exercising their traditional and customary practices and goes a long way to eliminate the "chilling effect" of negative conduct toward these rights.

Judicial Interpretation of Customary and Traditional Rights

In addition to limits placed in the plain language of the laws themselves, the courts have put their own judicial gloss on the exercise of these rights. Not only have the courts established clear, articulate standards for the protection of such rights, but they have also imposed conditions on the exercise of such rights based on the judges' own understanding of how traditional and customary rights should be exercised in a modern society.

Standards Protecting the Exercise of Customary and Traditional Rights

Obligation of government officials to protect those rights. Hawai'i's courts have held that with the enactment of Article 12 section 7, it is the obligation not only of the courts but also of state and county agencies to ensure that traditional and customary rights are adequately protected in the planning and permitting of development activities. In 1982, former Chief Justice William S. Richardson, in one of his last opinions before he left the Supreme Court held in *Kalipi v. Hawaiian Trust Co.* (1982) that Article 12 section 7 imposes a mandate on the judicial branch of government to protect traditional and customary rights under Hawai'i law. Fifteen years later, the Supreme Court held in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* (1995), commonly referred to by its acronym as the "PASH" case, that the obligation to protect traditional and customary practices extends to county and state land use agencies that approve land use permits that affect access and gathering practices. Agencies cannot idly sit by when faced with decisions that affect these practices. As the PASH court explicitly stated, an agency "does not have the unfettered right to regulate the rights of ahupua'a tenants out of existence" but must "to the extent feasible . . . protect the reasonable exercise of customary or traditional rights" (*Public Access Shoreline*, 1995, at 451). In following this holding, the Supreme Court, in *Ka Pa'akai O ka 'Āina v. Land Use Commission* (2000) held that a state land use agency violated the tenets of Article 12 section 7 by delegating its responsibility to a private entity controlled by developers to make after-the-fact determinations and mitigations of development impacts on the traditional and customary rights in question (*Ka Pa'akai O ka 'Āina*, 2000, at 66–67). As the court explained: "Indeed, the promise of preserving and protecting

customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection" (*Ka Pa'akai O ka 'Āina*, 2000, at 60).

A legitimate defense to a claim for a "taking" of private property, or criminal trespass over private property. The Hawai'i Supreme Court has held that the exercise of customary and traditional rights is not a "taking" of private property usually compensable under the Fifth and Fourteenth Amendments to the U.S. and Hawai'i constitutions because these rights were reserved by the King in all original land titles issued in Hawai'i (*Public Access Shoreline*, 1995, at 451–452). Hence, there was nothing to "take" from the landowner. Similarly, the Court has held that the exercise of traditional and customary rights may be raised as a legitimate defense and thus qualify as a privilege for purposes of enforcing criminal trespass statutes (*State v. Hanapi*, 1998).

Who may exercise customary and traditional rights. One of the issues that has arisen is whether the exercise of customary and traditional rights is limited by the language of Article 12 section 7 to those persons "who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778."[4] Both the *Pele Defense Fund* and PASH cases have held that the Hawaiian ancestry requirement referred to in Article 12 section 7 does not require a specific blood quantum to qualify, as the Hawaiian Homes homestead leasehold program. The PASH court explained that

> [c]ustomary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States. (Public Access Shoreline, 1995, at 449)

In fact, PASH and subsequent cases stated that they were expressly reserving the issue of whether (a) non-Hawaiian descendants of citizens of the Kingdom of Hawai'i who arrived after 1778 and (b) non-Hawaiian members of an 'ohana may legitimately assert Native Hawaiian rights, having never faced the issue directly (Public Access Shoreline, 1995, at 449, n. 41).

In 2002, the Third Circuit Court had the opportunity to address this issue in *Pele Defense Fund v. Estate of James Campbell* (findings of Fact and Conclusions of Law; Order filed 8/26/03 in *Pele Defense Fund v. Estate of James Campbell*). In *Pele Defense Fund*, evidence was adduced that members of the Pele Defense Fund, a nonprofit organization dedicated to preserving and perpetuating the subsistence, cultural, and religious practices of Native Hawaiians in the Puna district, hunted pigs, goats, and wild cattle, farmed, and gathered maile as well as medicinal plants within the former Wao Kele O Puna Natural Area Reserve (Findings of Fact and Conclusions of Law; Order filed 8/26/03 in *Pele Defense Fund v. Estate of James Campbell*, Civ. No. 89-089, Hilo, at 27–28). Many of these members of the Pele Defense Fund were of 50% or more Hawaiian ancestry, and also included non-Hawaiians who married or were relatives of Hawaiian spouses who learned and practiced customary and traditional practices, such as hunting and gathering (Findings of Fact and Conclusions of Law, at 27–28). On the basis of the evidence presented, the Court concluded that the class of persons entitled to exercise customary and traditional rights in this case included: "1) Hawaiian subsistence or cultural practitioners who are descendants of the inhabitants of the Hawaiian Islands prior to 1778"; "2) Person or persons accompanying Hawaiian subsistence or cultural practitioners described in [1]"; and "Persons related by blood, marriage or adoption of Hawaiian subsistence or cultural practitioners described in [1]" (Findings of Fact and Conclusions of Law, at 34). This case has not been appealed and remains good law.

Conditions Placed on the Exercise of Customary and Traditional Rights

Native customs and practices. One of the first limitations that courts imposed on practitioners was that the rights exercised must be utilized to practice native customs (*Kalipi v. Hawaiian Trust Co.*, 1982). In other words, "there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice" (*State v. Hanapi*, 1998). While this may seem simple enough, the courts have rejected claims based on

traditional and customary rights to pasture horses (*Oni v. Meek*, 1858), park vehicles alongside access routes to kuleana lands (*Haiku Plantations v. Lono*, 1980), or using a practice as a ruse to trespass on private property (*State v. Hanapi*, 1998) as being "nontraditional uses" not entitled to protection (*Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 1995, citing to *United States v. Wynans*, which noted that the lower court rejected an Indian's claim to occupy traditional grounds for camping while fishing). Nonetheless, courts are willing to find a practice a "traditional" one, even though the methods used to carry out the custom and practice evolved after Western contact (see, e.g., *Kalaukoa v. Keawe*, 1893, right of way expanded from foot/horse traffic to include use by carriages; *Palama v. Sheehan*, 1968, right of way expanded from pedestrian to vehicular use). Finally, claims made by practitioners who exercise customary and traditional rights for commercial use have received little sympathy from the courts as a bona fide "subsistence" purpose.[5]

The "reasonable" exercise of custom and practice. A second limitation imposed by the courts is that the exercise of such rights must be "reasonable." Once it has been determined that the existence of a particular custom or practice has continued in a particular area, the courts/agency conduct a balancing test under section 1-1 of "the respective interests and harm" between practitioner and landowner. If the landowner can demonstrate that the exercise of such rights will result in "actual harm," the court must find that the practice is "unreasonable" because section 1-1 ensures the continuance of such practices "as long as no actual harm is done thereby" (*Kalipi*, 1982, *supra*, at 10–11). Indeed, the Court in PASH stated that a court/agency may allow development where the preservation and protection of customary and traditional rights would result in "actual harm" to "the recognized interests of others" (*Public Access Shoreline*, 1995, at 450, n. 43). However, the determination of "actual harm" is to be made on a case-by-case basis.[6] At least one case has held that "fully developed" property may amount to "actual harm" (*State v. Hanapi*, 1998, at 186–187), although PASH has explicitly held, as previously stated, that "to the extent feasible," a court or agency "must protect the reasonable exercise of customary or traditional rights" (*State v. Hanapi*, 1998, at 451).

The exercise of rights on undeveloped lands. A third limitation was the judicial doctrine of "undeveloped lands," first enunciated by Chief Justice Richardson in *Kalipi v. Hawaiian Trust Co.* (1982, *supra*, at 8). Justice Richardson declared that the exercise of traditional and customary rights could only occur on lands that were not developed. Although not expressly stated in section 7-1, Richardson explained that "if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the [ahupuaʻa], including fully developed property to gather" (*Kalipi*, 1982, *supra*, at 8). Richardson further explained:

> In the context of our current culture this result would so conflict with understandings of property, and potentially lead to disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture. (*Kalipi*, 1982, supra, at 9)

Decisions following *Kalipi* have applied Richardson's "undeveloped lands" doctrine to "fully developed" lands but have left open the question of whether rights can continued to be exercised on "less than fully developed" lands. As the court stated in PASH: "we choose not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed'" (*Public Access Shoreline*, 1995, at 450). At least one case decided after PASH concluded that lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure constitute "fully developed" property (*State v. Hanapi*, 1998, at 186–187). While examples of what the court in *Kalipi* considered as a "developed" parcel were the judge's understanding of what was acceptable in the Hawaiian culture and what was not, later cases faced by courts proved to be more problematic. For example, in the *Pele Defense Fund* case, was an abandoned geothermal well site and drill pad considered a "developed" site? Does a newly constructed road that

crossed over an ancient trail mean that the trail can no longer be used because it has been dissected by a "developed" area? As the Court later explained in PASH:

> Once land has reached the point of "full development" it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights. . . [and] although access is only guaranteed in connection with undeveloped lands. . . [it] does not require the preservation of such lands[.] (*Public Access Shoreline*, 1995, at 451)

Other Issues

The exercise of customary and traditional rights under state law cannot alone provide for the continued well-being of Hawaiian practitioners; it simply provides a legal framework for those who choose to exercise those rights. Equally important and integral to the success of the continued exercise of customary and traditional rights are (a) education of practitioners about the existence of these rights and (b) the continued sustainability of the land, ocean, and the natural resources on which these rights are exercised.

With regard to the issue of educating more practitioners, there is still much to be done. One of the difficulties has been Hawaiian and other indigenous cultures' general deep-seated mistrust of a Western legal system that has been largely foreign and unresponsive to their needs. Compounding the problem has been the nonconfrontational nature of the Hawaiian culture and a look toward alternative dispute mechanisms when faced with a problem. Nonetheless, the assertion of these rights within a Western legal system is critical because it promotes and validates the importance of such rights, thereby giving respect and integrity to the well-being of native practitioners.

With regard to the continued renewability of a sustainable resource, traditional or customary laws do not prevent or guarantee that the resource that is the object being used will itself not become exploited through overuse or depletion. As one court noted,

> These [traditional and customary] rights are rights of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. As such those asserting the rights cannot prevent the dimunition or destruction of those things they seek. (*Kalipi v. Hawaiian Trust Co.*, 1982, at 8, n. 2)

Indeed, much of Hawai'i's resources on which Hawaiians have depended for their subsistence, such as a favorite *ko'a*, or fishing ground, or gathering place for *maile* (a highly scented vine) or olonā, have been significantly depleted or obliterated because of development activities such as runoff, overgrazing, or fishing pressure that are conducted with little regard to responsible stewardship. To combat this, Hawaiians have resorted to other environmental and land use planning laws to protect the resource with mixed results.

Conclusion

Laws that uphold the traditional and customary practices of Native Hawaiians serve an important role in improving the quality and overall well-being of Native Hawaiians. The impact of these laws on the well-being of Native Hawaiians should be the subject of further empirical studies. Other factors in today's society, such as the continued renewability of the resource or the evolution of traditional Hawaiian societal values, and their impact on the ability to exercise traditional and customary practices, should be assessed as well. Nonetheless, judicial decisions that return water to a stream for the purposes of irrigating taro, increasing native aquatic life, or building estuary ecosystems, or that prohibit luxury home developments

that wantonly desecrate *iwi kupuna* (ancestral remains), natural monuments, and other cultural sites, represent a "good thing" for Hawaiian people because they uphold and embrace the dignity and respect of Hawaiian culture and give Native Hawaiians the confidence to continue to exercise their customs and traditions without fear, intimidation, or oppression and thus contribute to the well-being of Native Hawaiian people.

References

In Re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879).

Haalelea v. Montgomery, 2 Haw. 62-71-72 (1858).

Haiku Plantations v. Lono, 1 Haw. App. 263, 266 (1980).

Handy, E. S. C., & Handy, E. G. (1972). *Native planters in Old Hawaii: Their life, lore, and environment*. Honolulu, HI: Bishop Museum Press.

Hawai'i State Constitution, article XII, section 7.

Hughes, C. K. (2001). Uli'eo Koa: Warrior preparedness. *Journal of Community Health and Clinical Medicine for the Pacific, 8,* 393–400.

Kalaukoa v. Keawe, 9 Haw. 191 (1893).

Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 5 (1982).

Ka Pa'akai O ka 'Āina v. Land Use Commission, 94 Haw. 31 (2000).

Kuleana Act of 2003. (H.R.S. section 7-1).

Lam, M. C. (1989). The Kuleana Act revisited: The survival of traditional Hawaiian commoner rights in land. *Washington Law Review, 64,* 233–255.

Leslie, J. H. (2001). Uli'eo Koa program: Incorporating a traditional Hawaiian dietary component. *Journal of Community Health and Clinical Medicine for the Pacific, 8,* 401–406.

Letter from Hio et al. to House of Representative from Ko'olaupoko, O'ahu. (1851, August 14). Honolulu: Hawai'i State Archives.

McGregor, D. P. (1989). *Kupaʻa i ka ʻāina: Persistence on the land.* Unpublished doctoral dissertation.

Mokuau, N., Hishinuma, E., & Nishimura, S. (2001). Validating a measure of religiousness/spirituality for Native Hawaiians. *Journal of Community Health and Clinical Medicine for the Pacific, 8,* 407–416.

Molokaʻi Subsistence Task Force. (1994, June). *State of Hawaiʻi, Department of Economic and Business Development final report.* Honolulu, HI: Author.

Oni v. Meek, 2 Haw. 87, 90–91 (1858).

Palama v. Sheehan, 50 Haw. 298 (1968).

Pele Defense Fund v. Estate of James Campbell, Civ. No. 89-089 (Hilo).

Pele Defense Fund v. Paty, 73 Haw. 578, 619 (1992).

Privy Council Records 681, 713 (1850).

Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaiʻi 425, 447 (1995).

Pukuʻi, M. K., & Handy, E. S. C. (1978). *The Polynesian family system in Kaʻu, Hawaiʻi.* Boston: Charles E. Tuttle.

Selected Letters From the Land File. (1846–1851). Honolulu: Hawaiʻi State Archives, Department of the Interior of the Hawaiian Kingdom.

Stand. Comm. Rep. No. 57. [Reprinted in Proceedings of the Constitutional Convention of Hawaii of 1978, 640].

State v. Hanapi, 89 Haw. 177, 184 (1998).

Titcomb, M. (1983). *Native use of fish in Hawaii.* Honolulu: University of Hawaii Press.

Notes

1 For example: (a) the Hawaiian Homes Commission Act of 1920, as amended, for which Congress set aside a portion of former Crown and Government lands of the Kingdom of Hawai'i for homesteading by Native Hawaiians at nominal lease rent, and (b) the Ceded Lands Trust, a trust established by Congress in 1959 when

Hawai'i was admitted into the Union, consisting of all revenues derived from the leasing of the remaining former Crown and Government lands, a portion of which was designated in 1978 for Hawaiian programs.

2 The are more than 85 statutes enacted by Congress for services to Native Hawaiians. Some of the more familiar acts are (a) the Native Hawaiian Education Act of 2002 (Pub. L. No. 107-110, codified at 20 U.S.C. sections 7511–7517), and (b) the Native Hawaiian Health Care Act of 1988, now titled the Native Hawaiian Health Care Improvements Act (codified as amended at 42 U.S.C. sections 11701–11714).

3 See, for example, S.B. 344, 108th Cong., 1st Sess. (2003), referred to as the "Native Hawaiian Recognition Act of 2003."

4 Case law decided prior to the enactment of article 12, section 7 did not condition the exercise of rights granted under sections 7-1 and 1-1 on the race or ancestry of the practitioner.

5 As Chief Justice Richardson explained in *Kalipi*, extension of the rights set forth in section 7-1 to persons who did not reside in an ahupua'a "would be contrary to the intention of the framers in that the right would thereby be spread to those whose only association with the ahupua'a may be by virtue of an economic investment." But *cf. Haalelea v. Montgomery*, 2 Haw. 62-71-72 (1858) (unlike section 7-1, law regulating ahupua'a fisheries) allows tenant to sell fish commercially.

6 Courts have rejected as "actual harm" the notion that the methods used by practitioners must evolve to accommodate changes in the exercise of customs and traditions. So, for example, trails and cart paths traveled on have evolved over time to accommodate motor vehicles. Similarly, motor boats, metal spears, and guns have been accepted as modern methods of practitioners capturing their prey.

ABOUT THE AUTHOR

Paul F. Nahoa Lucas, JD, serves as division senior counsel for the Education Legal Division, Kamehameha Schools.