

Tenure versus Title

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Who owns the Crown lands of Hawaii?, by Jon Van Dyke;
University of Hawaii Press, 2008.

A BOOK can be significant, even if its assumptions from the present dominate its interpretations of the past, if it raises awareness of an important subject that isn't well understood. The story of how the Crown lands of Hawaii came to exist, and how they evolved, should interest Australians, even though the term Crown land means something different in the Australian and Hawaiian contexts. In Australia, Crown land is public property belonging to one of the divisible metonymic Crowns that, independent of the person of the sovereign, represents the legal authority of a state or commonwealth government. Native title, on the other hand, recognises that indigenous Australians have a legal interest in their land which survives the metonymic Crown acquiring sovereignty over Australia. The situation is more complex in Hawaii where Crown land and native *tenure* (a more appropriate term than *title*) overlap.

According to the preface of the Constitution of 1840, all land once belonged to the sovereign (mō'ī) as the embodiment of sovereignty. But it was never his or her private property. The land really belonged to the chiefs (ali'i nui and kaukau ali'i, the latter including konohiki or "stewards of the land") and commoners (maka'āinana or "people of the land") with the mō'ī as head custodian. During the land division in the late 1840s, known as the māhele, Hawaiian land was divided among the mō'ī, the ali'i nui and kaukau ali'i, and the maka'āinana. The māhele separated Crown land from government land, although both devolved from and were related to the mō'ī. Crown land was the personal property of the mō'ī, intended to support the monarchy, under a new land system based on alienable title. Government land was public property, also alienable, owned by the metonymic Crown of Hawaii as a sovereign nation. The challenge of the māhele, therefore, was adapting a traditional inalienable polity to a modern alienable polity, and the challenge became a problem that's never been solved.

Van Dyke is well intentioned and believes he has a solution to the problem. The title of his book, *Who owns the Crown lands of Hawaii?*, asks the question but his leitmotiv is really who *should* own the Crown lands. Australians need to be aware of two elephants in this room. To identify the first, know that in 1993 Congress and President

formally apologised to the Hawaiian people for the role the United States played in the illegal overthrow of their sovereign government. To identify the second, know that the Akaka Bill, legislation granting tribal sovereignty to native Hawaiians, giving them similar status as native Amerindians, keeps being re-introduced to Congress and keeps failing to pass. Although widely seen as a best buy, or a useful first step, in indigenous remediation and reconciliation, one of the problems with the legislation is that Hawaiians are fundamentally different from Amerindians. They have a unique claim to their land, since neither the lawful legislature nor lawful government, nor the lawful sovereign, agreed to relinquish sovereignty to the United States. These two elephants are present on every page of *Who owns the Crown lands of Hawaii?*

Van Dyke begins with an introduction that sets his tone. He believes the māhele was an attempt by the mō‘ī of the time, Kamehameha I, to keep Hawaiian land in indigenous hands in the event of a foreign power annexing his kingdom. During the nineteenth century, the likelihood of that happening was real, since the “imperialist powers” were engaging in an “orgy of enslavement” (an irresistible phrase borrowed from another author) while “seeking territory in the Pacific to add to their empires”. These empires are referred to in no particularly rank as those of the United States, the United Kingdom, France, and Germany. Indeed, Kamehameha I ceded Hawaii to the United Kingdom in 1843, under protest, on being issued with an ultimatum by Lord George Paulet, a loose cannon and commander of the *Carysfort*, who was “responding to disputes over property claims made by British residents in the islands”.

Sovereignty was restored five months later, when Rear Admiral Richard Thomas arrived on the *Dublin*, realised the cession was against British foreign policy, lowered the British flag, and solved the property disputes by forcing Kamehameha I to sign an agreement which also secured Hawaii’s sovereignty as far as the Hawaiians and the British were concerned. Is there an irony here? On the one hand we’re told the United Kingdom was an imperialist power participating in an orgy of enslavement; on the other hand we’re told the United Kingdom revoked the cession as it was against British foreign policy. Can we have it both ways?

With such an introduction, Van Dyke wants the reader to understand the māhele as a knee-jerk response to the West’s rampant quest for empire; although he admits, as an aside, in one short parenthetical phrase, that the māhele was also a response to local Western advisers “who argued that a system of private property would promote economic stability and development”. Those advisers were local missionaries and foreigners, mostly American, who had become influential in Hawaii, and this aside should have been given at least as much prominence as the orgy of enslavement. Its implications need to be expanded, since the māhele was part of a process, planned for

years, through which Hawaii was transforming itself from a feudal kingdom into a modern democracy and translating its unwritten common law into written statutory law.

The question of who owns the Crown lands of Hawaii is part of a broader story of national self-determination; a story that's easily obscured if indigenous Hawaiians are described as pawns or victims without free will. It's difficult to avoid the kind of presentism that robs indigenous protagonists of the integrity of their decision-making, including the integrity of their indecisiveness, but we still need a better understanding of what Hawaii was trying to achieve during the century after contact. Unfortunately, this book doesn't go far enough in promoting that understanding, in spite of the importance of its subject. The elephants in the room get in the way.

The reader should have been told at the beginning that the Hawaiian experience of contact was different from contact in Australia, or New Zealand, or anywhere else in the Pacific. Hawaii embraced contact in a distinctive way. Within fifty years of unification, it created a constitutional monarchy and became an internationally recognised sovereign nation. During the nineteenth century, Hawaii struggled to balance the interests of indigenous people with the interests of missionaries and foreigners. At the heart of the struggle lay two ideas that usually spoke past each other, and still do: the feudal Hawaiian idea of inalienable land tenure, with reciprocal obligations between rulers and ruled, and the modern American idea of alienable land title, with its intention of transforming the *maka'āinana* into a self-determining yeoman class.

The *māhele* was central to that struggle. It transformed Hawaii's land system from collective to private ownership. The goal was to divide the land into equal shares, one-third each to the *mō'ī*, the *ali'i nui* and *kaukau ali'i*, and the *maka'āinana*. Van Dyke makes the point, already made by many others, that the *maka'āinana* ended up with a fraction of what was intended for them. The reasons usually given are speculative: the *maka'āinana* didn't understand the new system of title; didn't realise they had to register their entitlements; couldn't afford the survey fees; forgot to register their entitlements; didn't register their entitlements as a way of boycotting the *māhele* in the hope of clinging to the old system of land tenure; or a combination of the above. Some suggest the *maka'āinana* who did have registered title to homestead land (*kuleana*) were coerced by foreigners to sell, more or less systematically, and by attrition, over a long period of time. Recent histories such as Osorio's *Dismembering Lāhui* and Stauffer's *Kahana: How the Land was Lost* are two examples among many of these views. There's lots of righteous anger out there in the humanities.

The *mō'ī* managed the Crown lands personally, through his agents: "transferring some, acquiring others, mortgaging others, and raising revenues from them." Van Dyke makes important observations here:

He also understood his responsibility ... to care for the people of the kingdom, and he recognised the gathering and other traditional rights of the maka‘āinana. Because the new Western-based land system was foreign to the native Hawaiians, it is difficult to apply modern legal concepts to describe how they conceptualised “ownership” during this period. Another reason why modern notions of personal ownership are not easy to apply is that the mō‘ī had no personal or private life. He was mō‘ī—always—and could never escape that role and responsibility.

This is true. The sovereign couldn’t escape being the sovereign. And yes the concept of ownership before and during the māhele is difficult to describe. But it remained difficult to describe for generations after the māhele. Is it really easier to describe now? Van Dyke romanticises the concept as *noblesse oblige* but there would have been lots of unromantic negotiating between the maka‘āinana and whomever they could find to negotiate with.

Traditionally, the “whomever” were the konohiki, the lower class of rulers who acted as stewards, but that changed dramatically and disconcertingly during the māhele, and had probably been changing since the early nineteenth century. The effects of the māhele on the maka‘āinana, and on the stewardship role of the konohiki, aren’t well understood. If we assume the traditional rights of the maka‘āinana were respected on Crown lands, more so than on other lands, we don’t know enough about these negotiations and how they worked. If it was intended the ali‘i nui and kaukau ali‘i (including the konohiki) continue to exercise a stewardship role after the māhele, we don’t know enough about the intention (or the reality) and how it worked. One of the problems of Hawaiian historiography generally is the tendency to fill gaps with history from above (what we know about the mō‘ī and ali‘i nui) when history from below (what we don’t know about the konohiki and maka‘āinana) becomes too hard. Ultimately, though, the measure of this book is whether it contributes to our understanding of the relationship between rulers and ruled, between mō‘ī and konohiki and maka‘āinana, before and during and after the māhele, not whether the Crown lands are a solution to the ongoing debate about Hawaiian sovereignty.

As the new Crown lands were alienable personal property, and the mō‘ī didn’t receive funding from the government to support his office, Kamehameha III leased and sold and mortgaged portions to generate revenue. When he died in 1854, the Probate Court struggled with how his estate should be dispersed, including how the Crown lands should be distributed. His will, made in 1853, named his adopted (hānai) son, Alexander, heir and successor, set aside portions of Crown lands for his widow, Kalama, in lieu of

her dower rights, and bequeath the remainder of his estate to Alexander (who hadn't received any land in the māhele, perhaps because he was heir apparent at the time).

When Alexander acceded in 1855, he acknowledged the existence of Kalama's dower rights, by providing her with a payment for life, and she signed a deed of release from any additional dower claims in the future. During his short rein, Alexander managed the Crown lands as if they were his own and asked his wife, Emma, to waive her dower rights over any portions that were sold. When Alexander died intestate in 1863, his brother Lot was declared the new mō'ī and Emma and Lot argued over Alexander's estate. Emma claimed the Crown lands were the private property of her husband and therefore she was entitled to at least half of them as his heir (in addition to her dower rights). Lot claimed the lands were attached to the Crown, hence they should go to the new mō'ī even if he or she was not an heir by descent of the previous mō'ī. It wasn't a personal argument, as Emma and Lot were close friends; Van Dyke believes both had the interests of Hawaii uppermost in their similar-but-different royal minds. It was an argument created by the māhele and the unsolved problem of the inalienable versus the alienable.

The Supreme Court of Hawaii reached a compromise decision, ruling the Crown lands were attached to the metonymic Crown and should pass to the new mō'ī, not to the heirs of the previous mō'ī, but the queen of the late mō'ī was also entitled to a dower share. Van Dyke believes this compromise decision is "incorrect" in that it isn't based on clear or consistent or understandable principles of law, even if the compromise can be defended as "equitable" because it provided each party with a partial victory and was designed to provide support for the monarchy at a time of economic difficulties. He also believes this compromise decision "provided the precondition for the loss of control of the Crown lands by the native Hawaiian people three decades later, at the time of the overthrow and annexation". However, his logic here is hard to follow.

In 1865 the Legislature passed a statute that tried to solve the issue. The statute established a procedure to pay off Alexander's debts and extinguish remaining mortgages left unsatisfied by his estate. Most importantly, it declared the Crown lands "shall be henceforth inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever", created a three-person Board of Commissioners to manage them, associated with the Department of the Interior, and prohibited any lease of Crown land for a period longer than thirty years. Under the statute, the Crown lands were maintained in a relatively stable condition between its enactment in 1865 and the 1893 overthrow of the kingdom. Shortly after she became mō'ī in 1891, Lili'uokalani instructed the Board to "set aside choice sections of the Crown lands for homestead subdivision in 10 acre lots on a 30 year lease and cultivation; first 5 years to be rent free,

balance at nominal yearly rent of \$1.00 per acre.” Her hope was that these lands would go primarily to indigenous Hawaiians.

In 1895, president of the illegal republic of Hawaii, and son of American missionaries, Sanford Dole, who had argued for most of his life that the Crown lands should be alienable, signed a statute which formally merged Crown land with government land and made these new “public lands” alienable. The goal of the new Board of Commissioners was to distribute as much land as possible to those who were eligible for three separate homestead programs: right-of-purchase lease, cash freehold, or a 999-year [sic] homestead lease. Most of the land distributed under these three programs went to foreigners, principally to American and Portuguese nationals. Less than half went to Hawaiian nationals, including a few persons born in Hawaii of foreign parents. Van Dyke notes that by the time Dole retired in 1903, he seems to finally have recognised the deep differences in values between Hawaiians and the Americans who took Hawaii from them, which revolved around tenure versus title, or inalienability versus alienability.

When Hawaii was annexed as a territory in 1898, without a treaty, amid near-universal opposition from the indigenous population, about 1.75 million acres of the former Crown lands and government lands were “ceded” to the United States by the illegal republic of Hawaii. But there was a clause in the resolution, requiring revenues from Hawaii’s public lands to be put, not into a general federal fund, as was the usual case, but into a separate fund for the “inhabitants of the Hawaiian islands for educational and other purposes”. In 1900 an organic statute was enacted by Congress, through which the United States transferred responsibility for these public lands to the Territory of Hawaii.

In 1959, Congress transferred about 1.4 million of these 1.75 million acres of this public land to the new State of Hawaii, along with the fiduciary responsibilities of a trustee: “for the support of the public schools and other public educational institutions, for the betterment of the condition of native Hawaiians, as defined by the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.” Van Dyke believes these carefully crafted provisions were based on the recognition that indigenous Hawaiians have continuing claims to these lands, which must be held in trust until those claims are finally resolved.

The elephants representing this belief dominate the book and prevent it from contributing something new to our understanding of the relationship between rulers and ruled, especially between *mō‘ī* and *maka‘āinana*, and the evolving stewardship role of the *konohiki*. That said, the book has a kind of imprimatur, although perhaps not the kind

Van Dyke needs. First, it's one of the many beautifully produced books from the University of Hawaii Press, lavishly designed to influence the reader. Second, there's an incisive foreword by William Richardson, retired Chief Justice of the Hawaii Supreme Court, who declares the book's importance in addressing a challenge: of bringing coherence to the law that governs Hawaii which remains unfinished as long as the claims of indigenous Hawaiians are unresolved. Richardson believes Van Dyke's book should move that process forward. However, not all sovereignty activists agree, including those who (one imagines) would normally be Van Dyke's natural allies, since the issue of Hawaiian sovereignty is much larger than who owns (or should own) the Crown lands.

The claims of indigenous Hawaiians do need to move forward. Nearly everyone now accepts the need for remediation and reconciliation, indigenous and non-indigenous, including state and federal governments. Because the story of the Crown lands isn't as well known as it should be, this is a useful reference book, even if it relies on secondary sources for historical background, and focuses narrowly on the Crown lands as a convenient solution to a longstanding problem. In spite of its presentism and romanticism, the maps and tables, and transcripts of legislation and legal judgements, are worth the purchase price. Anyone interested in comparing and contrasting the indigenous contexts of Australia and Hawaii should consult the wealth of factual information in it.

But watch out for the elephants.

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