Custom and Constitutionalism in the Federated States of Micronesia

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I. INTRODUCTION

The people of the Federated States of Micronesia ("FSM") have modeled their Constitution upon that of the United States, the metropolitan government which oversaw their evolution from wardship to self-government and membership in the United Nations ("U.N."). As is typical of the new Pacific Island nations established in the second half of the twentieth century, however, the FSM is striving to assure that its legal system also respects and incorporates the values and traditions around which the lives of the people have always revolved.

The people of the FSM understand that their traditional institutions and practices were developed to meet the needs of an earlier day, the needs of a people who expected to remain separate from other cultures. They are now attempting to draw on constitutional principles and legal concepts developed elsewhere to assist them in joining together and taking their place as part of the world community. Yet, the heritage and identities of the peoples of Micronesia are found in their customs and traditions. The Constitution of the FSM includes a "Judicial Guidance

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Clause," requiring that decisions of the Court be "consistent" with the customs and traditions of the indigenous people of the FSM.[1]

As the first (now retired) Chief Justice of the FSM, I shall here discuss key decisions in which the FSM Supreme Court was called upon to implement the Judicial Guidance Clause, by upholding the island nation's commitment to customs and traditions while implementing borrowed constitutional and legal concepts.

II. BACKGROUND

A. *The Federated States of Micronesia*

The Federated States of Micronesia ("FSM") is a tropical Pacific Island nation located north of the equator in the Caroline Islands, extending east to west over some 2,000 miles in the area between Hawai'i and the Phillipines. About 100,000 people live on some 600 islands, most of which are coral atolls sprinkled across 1,000,000 square miles of ocean. All told, the FSM comprises a land area of approximately 270 square miles. About half of the population resides on the four high volcanic island state capitals of Kosrae, Pohnpei, Chuuk, and Yap. At least six different basic languages (Kosraean, Kapingi, Pohnpeian, Chuukese, Woleaian and Yapese) and numerous dialects are spoken by FSM citizens.

Prior to July 12, 1978, when the Trust Territory districts of Truk (now Chuuk), Ponape (now Pohnpei), Kusaie (now Kosrae), and Yap voted in a plebiscite to join under the new FSM Constitution,[2] the people of the FSM never directly experienced constitutional government and self-government in any form as a unit.[3] From 1947 through 1986 (although

[1] FED. ST. MICR. CONST. art. XI, § 11, *available at* http://www.fsmgov.org/congress/bills/constit/fsmcon.html (last visited Nov. 26, 1998) . Throughout this article, the Federated States of Micronesia (FSM) Constitution is referred to as the "Constitution" and the U.S. Constitution is referred to as the "U.S. Constitution."

[2] General Information on Federated States of Micronesia–History, *at* http://www.fsmgov.org/info/hist.html (last visited Oct. 17, 2001) [hereinafter Federated States of Micronesia-History].

[3] *Id.* Spain laid claim to the area during the 19th century. The Spanish American War in 1898 led to dissolution of most of what then remained of the former Spanish Empire. Germany "purchased" Micronesia from the Spanish at that time and continued to claim control of the area until displaced by Japan during World War I. *Id*. In 1919, Japan received authority to govern the area as part of a League of Nations mandate. Japan withdrew from the League of Nations in the *mid*-1930's, but Japanese hegemony over the islands continued until World War II. Micronesia was the scene of considerable conflict, and came under the control of the United States and its allies, during World War II. *See id.*

implementation of constitutional self-government began in 1979), the area now known as the FSM remained part of the Trust Territory of the Pacific Islands, a U.N. Trusteeship administered by the United States under a trusteeship agreement entered into that year with the U.N.[4] The FSM is now a self-governing member of the U.N., with a relatively new form of working arrangement with the United States known as free association.[5]

B. *The Chief Justice*

My wife, Joan, and I came to the FSM as committed supporters of unified self-government for Micronesians. From 1972 to 1976, I served as deputy director of the Micronesian Legal Services Corporation ("MLSC"), which provided legal services to all persons throughout the vast Trust Territory of the Pacific Islands, covering an area in the Pacific as large as the continental United States. Our family lived on Saipan, the seat of the Trust Territory headquarters, in the Marianas Islands.

My primary responsibility was to oversee MLSC's litigation efforts. This required frequent travel throughout the entire Trust Territory. I also had the opportunity to be heavily involved in significant litigation on behalf of various Micronesian clients as they challenged governmental actions of American and Trust Territory government institutions in Micronesia.[6]

My wife, as Micronesia Bureau Chief for a Gannett newspaper published in Guam, covered the 1975 Micronesian Constitutional Convention, which produced the Constitution ratified by the people of the FSM in a plebiscite held on July 12, 1978.

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[4] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301. *See generally* DONALD F. MCHENRY, MICRONESIA, TRUST BETRAYED: ALTRUISM VS. SELF-INTEREST IN AMERICAN FOREIGN POLICY (1975), for a fuller discussion of the administration of the Trust Territory.

[5] *See* Proclamation of Pres. Tosiwo Nakayama, Nov. 3, 1986; Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986) (*reprinted in* 48 U.S.C.A. § 1801 (West 2001)), *excerpted in* 81 AM. J. INT'L L. 405 (1987). The joint declarations also triggered implementation of the Compact of Free Association. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1771 (1986) (current version at 48 U.S.C.A. § 1901 (West 2001)).

[6] Although much of the litigation took place in the Trust Territory High Court, a crucial goal of the litigation strategy was to find ways to present the issues to the vastly more independent United States federal courts. *See generally* Saipan *ex rel.* Guerrero v. United States Dep't of the Interior, 502 F. 2d 90 (9th Cir. 1974); Ralpho v. Bell, 569 F. 2d 607 (D.C. Cir. 1977); Melong v. Micr. Claims Comm'n, 569 F.2d 630 (D.C. Cir. 1977); Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973).

Several years later, when the people of the FSM initiated constitutional self-government, I was serving as Director of the National Senior Citizens Law Center in Washington, D.C., a legal services back-up center with offices in Washington, D.C. and Los Angeles. The Vice President of the new FSM, Petrus Tun of Yap, came to Washington and said that the FSM's first President, Tosiwo Nakayama, had directed him to ask me to serve as the FSM's first Chief Justice.

Having been involved in the movement of Micronesians toward self-government, Joan and I were both pleased to have the opportunity to participate in the reality and to try to help assure the success of the effort. We moved to Pohnpei, the FSM's capital, in 1981.

Although justices of the Court have lifetime tenure under the Constitution,[7] my publicly stated insistence was that I would be replaced as soon as possible by a Micronesian Chief Justice, which we hoped would occur within five years. Appointment and confirmation of a replacement, however, proved politically difficult. We remained there until 1992, when finally I was replaced by an outstanding Micronesian, whom I had long hoped would be the next chief justice, Andon Amaraich.

C. *The Constitution*

The Constitution went into effect on May 10, 1979.[8] The new national government became fully functional when the national judiciary was certified on May 5, 1981.[9] The Constitution is modeled upon the U.S. Constitution and confirms the influence upon Micronesians of some thirty years of Trust Territory rule by the United States. Like the U.S. Constitution, the Constitution separates key powers among the three branches of government.[10] The Constitution also has a Declaration of Rights patterned closely upon the Bill of Rights of the U.S. Constitution[11] and calls for a system of federalism akin to that of the United States.[12]

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[7] FED. ST. MICR. CONST. art. XI; *see also* General Information on Federated States of Micronesia–Government, *at* http://www.fsmgov.org/info/govt.html (last visited Oct. 17, 2001) [hereinafter Federated States of Micronesia-Government].

[8] Federated States of Micronesia–History, *supra* note 2, *at* http://www.fsmgov.org/info/hist.html; *see also* FED. ST. MICR. CONST. art. XVI.

[9] Lonno v. Trust Terr. of the Pac. Islands, 1 Fed. St. Micr. Intrm. 53, 56-57 n.5 (Kos. 1982).

[10] FED. ST. MICR. CONST. arts. IX-XI (establishing the legislative, executive, and judicial branches of government).

[11] *Id.* art. IV (Declaration of Rights).

[12] *Id.* art. VII (Powers of Government).

Yet, the Constitution differs from the United States model in numerous and significant respects.[13]

The crucial parts of the Constitution upon which this paper will focus are those designed to ensure respect for customs and traditions and values underlying customary structures and practices while implementing constitutional mandates. The goal, of course, is to preserve the Micronesian way of life.

Primary among the protective devices is the Judicial Guidance Clause, which instructs that "[c]ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia."[14] In addition, the Constitution

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[13] Departures from the U.S. Constitution include a prohibition against capital punishment. *Id.* art. IV, § 9. Noticeably absent from the Constitution is any provision guaranteeing the right to bear arms. *See id.* art. IV. Another substantial difference is the Constitution's prohibition against land ownership by noncitizens and noncitizen corporations, including corporations only partially owned by noncitizens. *Id*. art. XIII, § 4.

The United States model as to separation of powers is modified in that the FSM Congress is unicameral. *Id*. art. IX; *see also* Federated States of Micronesia–Government, *supra* note 7, *at* http://www.fsmgov.org/info/hist.html. The FSM Congress elects the President from its own membership. FED. ST. MICR. CONST. art. X, § 1. A national public auditor's office also is mandated. *Id*. art. XII, § 3.

Federalism in the FSM also differs in several ways from that of the United States. The FSM Congress is granted power "to establish usury limits on major loans." *Id*. art. IX, § 2(i). Moreover, the Constitution provides that appeals from state court decisions may be heard by the FSM Supreme Court appellate division. *Id*. art. XI, § 7. The FSM Congress is also required to contribute to the financial support of state judicial systems. *Id*. art. XI, § 10.

The judiciary article contains some rather subtle departures from U.S. federalism. For example, the FSM Supreme Court is given exclusive jurisdiction over cases in which the national government is a party, except where an interest in land is at issue. *Id*. art. XI, § 6(a). Although the provision has been almost entirely ignored, state courts are also required to certify issues of national law to the FSM Supreme Court appellate division for decision or remand. *Id*. art. XI, § 8. The FSM national government is also given certain responsibilities not referred to in the U.S. Constitution. These include taking "every step reasonable and necessary" to provide services in response to the "right of the people to education, health care and legal services." *Id*. art. XIII, § 1. The Congress is also told that every ten years it must reapportion itself, *id.* art. IX, § 10, and submit to the voters the question: "Shall there be a convention to revise or amend the Constitution?" *Id*. art. XI, § 2. This provision gave rise to a constitutional convention in 1990.

[14] *Id*. art. XI, § 11. The Judicial Guidance Clause was amended by the Constitutional Convention of 1990 by adding a new sentence: "In rendering a decision, the court shall consult and apply sources of the Federated States of Micronesia." Fed. St. Micr. Const. Conv., Comm. Proposal 90-19, S.D. 1, C.D. 1 (adopted Aug. 28, 1990), http://www.fsmgov.org/congress/bills/constit/90-19.pdf (last visited Jan. 12, 2002) (amending Judicial Guidance Clause); *see also infra* notes 47-59 and accompanying text.

includes a Traditional Rights Article, designed to prevent unnecessary erosion of the power and importance of tradition and traditional leaders.[15]

This paper considers how implementation of the Judicial Guidance Clause, the Traditional Rights Article, and related statutory provisions affected key areas of the system of justice of the FSM. The focus is on the FSM Supreme Court's implementation of these protective provisions and certain tensions, perhaps inherent in the goals of the new nation and in the provisions themselves, which have surfaced since adoption of the Constitution.

Part III of this article addresses the FSM Supreme Court's reliance on decisions of United States courts in interpreting the Declaration of Rights[16] and in establishing common law principles of tort and contract law in the FSM. Part IV discusses the Court's handling of possible clashes between generally accepted customs and specific constitutional protections of individual rights.[17]

III. RELIANCE ON DECISIONS OF UNITED STATES COURTS

A. *The Declaration of Rights*

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[15] FED. ST. MICR. CONST. art. V (Traditional Rights). Article 5 of the Constitution provides as follows:

> Section 1. Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.
>
> Section 2. The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.
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> Section 3. The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them.

Id.

[16] *Id.* art. IV (Declaration of Rights).

[17] Each of the opinions discussed were written by the author of this article. These will be discussed, however, as statements of the court, rather than of the writer. Throughout this article, references to the FSM Supreme Court Trial Division will be in lower case (the "court") and references to the appellate division, the nation's highest tribunal and the court of last resort, will be to "the Court."

Although the Constitution is modeled on the U.S. Constitution, the FSM Supreme Court has set a course for the FSM remarkably independent from constitutional decisions of U.S. courts.[18] That has not been so, however, with respect to decisions interpreting the Declaration of Rights.

Alaphonso v. Federated States of Micronesia,[19] the first appeal to the FSM Supreme Court, was an appeal from a straightforward criminal conviction handed down in Truk (now called Chuuk) by my only colleague on the Court, Justice Richard H. Benson, sitting in the Court's Trial Division.[20] The trial court had found that Pako Alaphonso, while

[18] Except for cases arising under the Declaration of Rights, the Court typically has expressed and demonstrated freedom to reach results somewhat different than those that would be obtained under United States law. This has been true even when the language under consideration has been generally similar to that of the U.S. Constitution. *See, e.g.*, *In re* Nahnsen, 1 Fed. St. Micr. Intrm. 97, 105-06 (Pon. 1982) (rejecting complete diversity requirement for jurisdiction); Aisek v. Foreign Inv. Bd., 2 Fed. St. Micr. Intrm. 95, 99 (Pon. 1985) (stating that the issue of standing to sue calls for "independent analysis rather than rigid adherence to the decisions of United States courts construing th[at] Constitution").

Much of the language in the Constitution has no counterpart in the U.S. Constitution. This has been seen as reflecting a decision by the framers "to select a road other than that paved by the United States Constitution." Tammow v. Fed. St. Micr., 2 Fed. St. Micr. Intrm. 53, 57-59 (App. 1985) (concluding that the division of powers between state and federal governments under United States constitutional jurisprudence is not controlling in assessing the constitutionality of the Major Crimes Clause in the Constitution).

[19] 1 Fed. St. Micr. 209 (App. 1982).

[20] The former trust territory high court spoke of its "Trial" and "Appellate" divisions, although that court had only one staff and the Justices sat in both divisions. The only restriction was that a justice could not sit on an appellate panel considering an appeal from a case in which he had presided in the trial division. Although there are many problems inherent in such an arrangement, that is the structure with which the people of the FSM were familiar, and that is what they adopted. FED. ST. MICR. CONST. art. XI, § 2.

Throughout its first eleven years, the FSM Supreme Court had only two justices. Of course, one always would be unavailable to hear an appeal from his own decision. Yet, the Constitution required that, "At least 3 justices shall hear and decide appeals." *Id*. art. XI, § 2. In order to complete appellate panels, the chief justice was authorized to appoint "retired Supreme Court justices and judges of state and other courts." *Id*. art. XI, § 9 (b). The temporary service was uncompensated.

Appointees included judges and justices from state courts within the FSM, from other Pacific Island jurisdictions and from U.S. federal courts. Because the temporary judges appointed by the chief justice constituted the majority of any panel hearing an appeal from an FSM Supreme Court trial division decision, panels and procedures were selected with some care. The standard practice came to be that one temporary judge typically was appointed from within the FSM, and another from elsewhere.

We were reluctant to appoint two from outside the FSM courts because then all three members of the panel would be noncitizens of the FSM. It was felt however that a majority of the judges on any panel of the highest court should be formally trained in the

riding in his motorboat, had been shooting his revolver at persons in another boat.[21] Convicted of assault with a dangerous weapon, Alaphonso appealed on the ground, among others, that the evidence was insufficient to support a conviction.[22]

Counsel apparently assumed that the Court would simply follow the rule, well established in the United States and in the Trust Territory, that proof of guilt beyond a reasonable doubt is required to support a conviction.[23] However, the *Alaphonso* court read the Judicial Guidance Clause as requiring an independent determination:

> The Constitution instructs us that we may not merely assume away, or ignore, fundamental issues on the grounds that these basic issues have previously been decided in a particular way by other courts in other circumstances and under different governmental systems. The "judicial guidance" provision, Art. XI, § 11 of the Constitution, tells us that our decisions must be "consistent" with the "Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia."[24]

The Court then identified the starting point in the search for guiding legal principles: "We . . . look to sources of law and circumstances here [in the FSM] to establish legal requirements in criminal cases rather than begin with a review of cases decided by other courts."[25]

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law. Since none of the justices on the state courts within the FSM had law degrees, only one state court justice sat on any particular panel.

The primary procedural protection adopted was that, assuming the "permanent" FSM justice who had been nominated by the president and confirmed by the FSM Congress was in the majority, that justice normally was to write the opinion.

[21] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 226-27.

[22] *Id.* at 210.

[23] The general pattern throughout the early years of the Court was that counsel, both Micronesian and American, typically ignored opportunities to review first principles or to draw on custom and tradition, but instead assumed that American precedent would be followed.

[24] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 212.

[25] The Report of the Constitutional Convention's Committee on General Provisions, which explained the need for the Judicial Guidance Clause, cautioned against excessive reliance on United States and Trust Territory decisions:

> The intent and purpose of this provision is that future Micronesian courts base their decisions not on what has been done in

Finding no statute or rule of court prescribing the standard of proof for criminal cases in the FSM, the *Alaphonso* Court said:

> We start with the Constitution, the fundamental governing document of the people of the Federated States of Micronesia. The Constitution . . . provides that, "A person may not be deprived of . . . liberty . . . without due process of law . . . ." [citing FED. ST. MICR. CONST. art. IV]
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> The precise meaning of these words, especially as they may pertain to the standards of proof for criminal cases, is not self-evident. It therefore is permissible to seek assistance in determining the meaning of those words, and how the framers of our Constitution intended that they would be applied.[26]

The FSM's Due Process Clause is contained in Article IV, the Constitution's Declaration of Rights. The *Alaphonso* Court noted that previous FSM Supreme Court trial division decisions, based on a review of [FSM] constitutional history, had recognized that "[m]ost concepts and many actual words and phrases employed in the Declaration of Rights come directly from the United States Constitution, especially that Constitution's Bill of Rights."[27] Comparing the Due Process Clause of the U.S. Constitution with that of the Constitution, the Court found the pertinent language of the two clauses "practically identical."[28] The "parallels in language," the Court concluded, "leave little doubt that the

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> the past but on a new basis which will allow the consideration of the pertinent aspects of Micronesian society and culture.
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> The failure to include such a provision in the Constitution may cause the courts to follow the decisions of past Trust Territory cases or various foreign decisions which have dealt with similar interpretive or legal questions. This may be undesirable since much of the reasoning utilized may not be relevant here in Micronesia.

Report of the Comm. on General Provisions, Standing Comm. Rep. No. 34, 2 J. Micr. Const. Conv. 821, 822 (1975), *cited in Alaphonso*, 1 Fed. St. Micr. Intrm. at 213 [hereinafter S.C.R. No. 34] (proposing Judicial Guidance Clause).

[26] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 214.

[27] *Id.* at 214-15.

[28] *Id.* at 215. *Compare* FED. ST. MICR. CONST. art. IV, § 3 ("A person may not be deprived of life, liberty, or property without due process of law . . . .") *with* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

Due Process Clause of the United States Constitution is the historical precedent for the Declaration of Right's Due Process Clause in our Constitution."[29]

Referring to the two-volume Journal of the 1975 Micronesian Constitutional Convention, the Court noted that the Report of the Micronesian Constitutional Convention's Committee on Civil Liberties, which proposed the Declaration of Rights, including the Due Process Clause,

> . . . relied principally upon decisions of the United States Supreme Court and other United States Courts interpreting similar provisions of the United States Constitution.
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> The Committee's explanation of its basis for, and the meaning of, the proposed Due Process Clause focused exclusively on United States Supreme Court decisions interpreting the Due Process Clause of the Fifth Amendment of the United States Constitution.[30]

Following that lead, the Court reached the "obvious" conclusion that "we are to look to . . . decisions of United States courts concerning the Due Process Clause of the Fifth Amendment of the United States Constitution."[31] *Alaphonso* has been the controlling decision for constitutional analysis for individual rights established by the FSM's Declaration of Rights.[32]

B. *The Common Law*

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[29] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 215.

[30] *Id.* at 215-16 (citing Report of the Comm. on Civil Liberties, Standing Comm. Rep. No. 23, 2 J. MICR. CONST. CONV. 793-804 (1975) (proposing Declaration of Rights)).

[31] *Id.* at 216.

[32] *See, e.g.*, Ludwig v. Fed. St. Micr., 2 Fed. St. Micr. Intrm. 27, 32 (App. 1985) (adopting probable cause requirement as a basis for determining the reasonableness of a search or seizure); Ishizawa v. Pohnpei, 2 Fed. St. Micr. Intrm. 67, 79-80 (Pon. 1985) (permitting the search of a vessel without a search warrant where probable cause existed); Fed. St. Micr. v. Mark, 1 Fed. St. Micr. Intrm. 284, 294-97 (Pon. 1983) (adopting the "plain view" exception to the search warrant requirement); Etpison v. Perman, 1 Fed. St. Micr. Intrm. 405, 424 (Pon. 1984) (stating that the scope of the right to be informed of a proposed action affecting one's interests and the right to be heard should be determined in part through reference to United States court decisions).

Subsequently, similar reasoning led the Court to decide that, when constitutional and statutory provisions, customs, and traditions fail to furnish a full solution to issues the Court will look to common law applied in the United States and elsewhere.[33]

C. *Policy Considerations*

Paradox is inherent in *Alaphonso*, *Semens*, and their progeny. In the name of responding to the "social and geographical configuration of Micronesia"[34] and deciding cases on a "new basis which will allow the

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[33] Semens v. Continental Air Lines, Inc., 2 Fed. St. Micr. Intrm. 131, 139-40, 142 (Pon. 1985). In *Semens*, the Court laid out the following analytic method:

> In the context of the disputes here concerning the meaning of a contractual provision and possible liability for negligence, I consider the Judicial Guidance Clause to impose the following requirements on the Court's analytic method. First, in the unlikely event that a constitutional provision bears upon the case, that provision would prevail over any other source of law. Second, any applicable Micronesian custom or tradition would be considered and the Court's decision must be consistent therewith. If there is no directly applicable constitutional provision, custom or tradition, or if those sources are insufficient to resolve all issues in the case, then the Court may look to the law of other nations. Any approach drawn from those other sources, however, must be consistent with the letter and spirit of the Constitution as well as principles of, and values inherent in, Micronesian custom and tradition. Even then, the approach selected for the common law of the Federated States of Micronesia should reflect sensitive consideration of the "pertinent aspects of Micronesian society and culture," including Micronesian values and the realities of life here in general and the nation-building aspirations set forth in the Preamble of the Constitution, in particular.

Id. at 139-40.

Many FSM Supreme Court decisions discuss U.S. common law decisions and the Court has frequently adopted common law principles. The Court, however, has applied common law in imaginative and independent fashion, often reaching results at odds with historic common law principles on grounds that the FSM has no *stare decisis* (that is, precedent) and is free to set its own course. *See, e.g.*, Luda v. Maeda Rd. Constr. Co., 2 F.S.M. Intrm. 107, 112-13 (Pon. 1985) ("[T]he common law [today] . . . reflects no policy against wrongful death actions. . . . [FSM] Court[s] [are] not required . . . to adopt the same restrictive . . . method of interpretation employed by the first courts who approached wrongful death statutes more than a century ago."); Panuelo v. Pohnpei, 2 F.S.M. Intrm. 150, 163-64 (Pon. 1986) (holding that the doctrine of sovereign immunity protects against tort and contract claims only if declared through statute or constitutional provision).

[34] FED. ST. MICR. CONST. art. XI, § 11 (Judicial Guidance Clause).

consideration of the pertinent aspects of Micronesian society and culture,"[35] the Court produced a method of analysis that considers decisions of U.S. courts in determining the meaning of the FSM Constitution. The irony has not been lost on Court observers. Most people in Micronesia, and certainly any who look carefully at the Court's decisions, are aware that often the Court's analyses, especially when interpreting the Constitution's Declaration of Rights, lead to the use of decisions of U.S. courts for guidance.

Despite the apparent paradox, there are several reasons why such a result may be acceptable, even desirable. Words such as "due process," "equal protection," "unreasonable search," "cruel and unusual punishment," and "ex post facto" broadly delineate concepts that are of uncertain content and application. To some degree, this will always be the case, and this is the strength and genius of such words. Yet, by the time of the 1975 Micronesian Constitutional Convention, those words had become terms of art in U.S. constitutional jurisprudence. The words promise some definite protections. By contrast, those words were not commonly employed in conversation and had no established counterparts in any of the Micronesia languages. If Micronesian leaders and the general citizenry considered those words as having meaning, they surely thought of the meanings developed through American jurisprudence.

As *Alaphonso* points out, the delegates to the constitutional convention were drawing on phrases borrowed from the U.S. Constitution and were employing decisions of U.S. courts to explain the meaning of those terms.[36] The decision to enter into unified self-government under this particular Constitution was perhaps the most important decision ever made by the people of the FSM. The Court should strive to uphold and enforce the meaning which would have been anticipated by any person who did study the issues carefully before voting in the plebiscite.

It is also worth noting that, all other things being equal, reliance on outside sources could be beneficial to the aspirations of the FSM for economic development. Investors may be more likely to trust a legal system that they believe will provide predictable results based upon generally accepted legal principles.

Many persons are pleased with the Court's enforcement of the Declaration of Rights. Large numbers of impecunious, untitled "common" Micronesians are leery of wholesale reliance on the traditional system as the primary determinant of rights and responsibilities, for the untitled have few clear protections under that system. These people are

[35] S.C.R. No. 34, *supra* note 25, at 822.

[36] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 214-16; *see also supra* notes 26-31 and accompanying text.

pleased to have available notions such as "equal protection" and "due process."

Some persons, however, have expressed dismay with the Court's heavy reliance on American decisions. To many, it just does not seem right that, with all the grand pronouncements in the Committee Report concerning the Judicial Guidance Clause, the Court established by Micronesians to interpret their Constitution "in light of our customs and traditions"[37] would decide that the meaning of the Constitution is to be determined through reference to the U.S. Constitution.

The reasoning of the objections has been superficial and unpersuasive and, most important, remarkably devoid of helpful suggestions. The most vocal critic is Brian Tamanaha, a United States citizen who had lived in Yap for only about two years, as a member of the Yap attorney general's office, before making his objections. He has argued that the *Alaphonso* analysis is "embarrassingly false" in regarding the delegates to the Micronesian Constitutional Convention as legitimate "[f]ramers" of the Constitution.[38] His primary thesis is that the convention delegates had no real understanding of the import of the words in the Constitution.[39] He also states and considers it important that "[t]he [Civil Liberties] Committee Report Judge King referred to in his [*Alaphonso*]

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[37] S.C.R. No. 34, *supra* note 25, at 822. The Report states:

> Micronesia is an island nation scattered over a large expanse of ocean. Customary and traditional values are an important part of our society and lifestyle. It is important that this Constitution be interpreted in light of our customs and traditions. Without such assurance in the Constitution, the words we use may be interpreted to mean other than what we have intended.

Id.

[38] BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW 59-60 (Leiden Univ., Studies in Human Society Vol. 7, 1993) (Neth.) [hereinafter TAMANAHA, UNDERSTANDING LAW IN MICRONESIA]; *see also* Brian Z. Tamanaha, *Looking at Micronesia for Insights About the Nature of Law and Legal Thinking*, 41 AM. J. COMP. L. 9, 32-33 (1993) [hereinafter Tamanaha, *Looking at Micronesia*]; Brian Z. Tamanaha, *A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia*, 13 HASTINGS INT'L COMP. L. REV. 71, 109 (1989) [hereinafter Tamanaha, *Indigenous Jurisprudence in Micronesia*]. See Edward C. King, Book Review, 3 ISLA: J. MICRONESIAN STUD. 376 (Rainy Season 1995), for a more detailed response to Tamanaha's writings (reviewing BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993)).

[39] *See* sources cited *supra* note 38.

opinion was written by Expatriate legal counsel to the [Constitutional] Convention."[40]

The decisions and actions of the delegates at the Micronesian Constitutional Convention are entitled to respect. From the opening on July 12, 1975, until the convention adopted the proposed constitution on November 8, 1975, there were committee meetings, decisions, reports, actions, and floor debates. There is now a two volume journal of the Micronesian Constitutional Convention comprising more than 1,000 pages. A refusal now to regard seriously the decisions of the delegates and this Constitution, subsequently ratified by the voters of each state, would strike at the heart of the very concept of Micronesian self-government.

As to the Civil Liberties Committee report,[41] Tamanaha is flatly wrong. The author was not an American expatriate attorney, as Tamanaha assumes. That report, which proposed the Declaration of Rights, was written by Arthur Ngiraklsong, a Micronesian graduate of Rutgers School of Law, who is now chief justice of the Palau Supreme Court.[42] If the ethnicity of the author of a particular report is so important as Tamanaha suggests, it follows that the Civil Liberties Committee report should be followed closely, and that the Court indeed was correct in referring to decisions of U.S. courts interpreting the Bill of Rights in determining the protections furnished by the Declaration of Rights.

Tamanaha's suggestions are singularly unrealistic and unhelpful. His first contention was that the Constitution should be given a "less rigorous reading," and viewed merely as a "guiding document."[43] Micronesian judges should be appointed and they should set about "to do right," notwithstanding that their notion of "right" might require overriding not only the FSM Constitution, but also statutes and even their own prior decisions.[44]

The FSM Supreme Court's primary goal from the beginning was to place Micronesians in control of their own judiciary as soon as possible. However, that proved politically difficult. There was obvious reluctance on the part of the FSM Congress to vest a great deal of power in individual Micronesian justices. It is unrealistic to think that other parts of the institutions of government within the FSM would be willing to agree

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[40] TAMANAHA, UNDERSTANDING LAW IN MICRONESIA, *supra* note 38, at 60.

[41] *See supra* note 30.

[42] King, *supra* note 38, at 381.

[43] Tamanaha, *Indigenous Jurisprudence in Micronesia*, *supra* note 38, at 109.

[44] *Id.*

that individual Micronesian judges should have the power to override the words of the Constitution or statutes, purely on the basis of their individual senses of justice. Such a judicial power, of course, would threaten legislative power and could deprive the people of the FSM of the ability to bring about change by amending their own Constitution.

Tamanaha's second suggestion is even more outlandish. He asserts that Micronesians should create a "vacuum of knowledge" by excluding from participation all lawyers trained in the United States, Micronesian and American alike.[45] He also advocates dismantling the "state legal system," which would require setting aside all constitutional provisions, statutes, and everything else Micronesians have done in the name of self-government over the past thirty years.[46] Both of Tamanaha's suggestions are paternalistic, reflecting disdain for the decisions made by Micronesians in exercising rights of self-government.

Another suggestion has come from a much more significant source. In 1990, a second Constitutional Convention was convened on Pohnpei. One of the three constitutional amendments which resulted from that convention and the ratifying July 2, 1991 plebiscite, was the addition of the following sentence to the Judicial Guidance Clause: "In rendering a decision, the court must consult and apply sources of the Federated States of Micronesia."[47]

In the years since the amendment was adopted, the Court has not once applied this new sentence or even discussed it carefully.[48] The 1990 Constitutional Convention did not produce a full constitutional history similar to that of the 1975 convention, so it is not clear precisely what any of the members had in mind when they proposed this language.[49]

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[45] TAMANAHA, UNDERSTANDING LAW IN MICRONESIA, *supra* note 38, at 195.

[46] *Id.* at 196.

[47] *See supra* note 14.

[48] Considerably before this amendment was adopted, I had announced that I would be resigning as chief justice as of June 1, 1992. I did not find occasion to address the new language in any opinion decided within the relatively short time remaining before my resignation took effect.

[49] The Report of the Committee on Governmental Structure and Functions, proposing the amendment, stated:

> A review of Supreme Court decisions since the advent of constitutional government in the Federated States of Micronesia shows a pattern of reliance on precedent from the United States. Your Committee is concerned that the Supreme Court may not be giving proper attention to section 11 of article XI of the Constitution. Therefore, we support re-emphasizing our determination that courts shall first examine sources from the Federated States of Micronesia prior to relying on

As already demonstrated, the Court does in fact begin its analysis by consulting "sources of the Federated States of Micronesia."[50] The *Alaphonso* and *Semens* modes of analysis could be said to be applications of sources of the FSM, which in turn have led to the outside sources of guidance.

Presumably, however, the amendment is an expression of displeasure with repeated consideration of decisions of U.S. courts as a source of possible assistance in reaching decisions concerning issues that arise in Micronesia.[51] The message, which the Court should respect, is that the people of the FSM want reassurance that the Court is doing all in its power to carry out the original mandate of the Judicial Guidance Clause, to decide cases "on a new basis which will allow the consideration of the pertinent aspects of Micronesian society and culture."[52]

At the same time, it is important to regard the amendment as a muted restatement of concern, rather than as a shrill call for abandonment of the present mode of analysis. No complaint has ever been mounted against any specific result reached through use of the *Alaphonso* or *Semens* modes of analysis. Although much has been said about the

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> precedent from other jurisdictions. The word "source" is used broadly to include not only court decisions, constitutional history, and other legal writings from the Federated States of Micronesia, but also the customs and traditions of our nation. We support the general approach of the Supreme Court set forth in Semens v. Continental Air Lines, Inc., 2 Fed. St. Micr. Intrm. 131 (1985). In that case, the Supreme Court stated that in deciding a case it must look first to the Constitution, then to custom and tradition, and finally to foreign precedent only if the first two sources do not decide the case and the foreign precedent is "consistent with the letter and spirit of the Constitution as well as principles of, and values inherent in, Micronesian custom and tradition." Your Committee intends this proposed amendment to section 11 of article XI to provide additional guidance to courts for decision-making.

Fed. St. Micr. Const. Conv., Report of the Comm. on Governmental Structure and Function, Standing Comm. Rep. No. 27-90, at 2-3 (Aug. 23, 1990) (citation omitted).

[50] FED. ST. MICR. CONST. art. XI, § 11 (Judicial Guidance Clause).

[51] Tamanaha has contended that use of American staff attorneys in 1975 caused Micronesians to adopt constitutional provisions they did not understand. *See* sources cited *supra* note 38. Parity of reasoning would suggest that it is significant that Tamanaha served as staff counsel for the 1990 constitutional convention and that amendment of the Judicial Guidance Clause may reflect Tamanaha's own thinking more than that of the delegates to the convention.

[52] Report of the Comm. on General Provisions, Standing Comm. Rep. No. 34, 2 J. MICR. CONST. CONV. 821, 822 (1975).

frequent references to decisions of U.S. courts, nobody has contended that the Court has been insensitive to the needs or values of Micronesians or the parties before the Court.

The broad, national role of the Court is paramount and should be kept in focus.[53] The FSM Supreme Court, like federal courts in the United States, rarely would hear a case involving a dispute among persons from the same area or cultural group.

Finally, it should be understood that *Alaphonso* and *Semens* and their progency provide safeguards that prevent the Court and the people of Micronesia from being bound by decisions of United States courts. One is the "suitability" requirement. Looking to decisions of U.S. courts for guidance, the *Alaphonso* Court noted the United States Supreme Court decision in *In re Winship*,[54] explicitly holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[55] This, however, was not dispositive:

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[53] In 1981, before the Court had begun hearing cases and when the justices were considering adoption of rules of procedure, the Court sought comments and held a series of hearings. In a report discussing the comments and proposed rules, the Court described its role as follows:

> The role of the Supreme Court of the Federated States of Micronesia is rather well defined by the Constitution of the Federated States. The Court's principal task will be to enforce the FSM Constitution. To do this, the Court must uphold individual rights specified in the Constitution against encroachment by government. The Court's decisions must assist National and State Governments, and the various branches of those governments, to discern their roles and relationship to each other. The Court also will have jurisdiction over disputes between citizens of different states.
>
> These are all areas in which traditional leaders and customary decisionmaking played little, if any, role in Micronesia in the past centuries. The National Judiciary, along with the other branches of the government, is designed to help the Federated States of Micronesia forge into a new role and work with other nations on a basis of mutual respect. This is a task calling for highly sophisticated decisionmaking, and is not one traditionally fulfilled through, or particularly well suited for, customary decision-making.

Explanation of the Rules for Admission to Practice before the Supreme Court of the Federated States of Micronesia 10-11 (June 30, 1981) (on file with author).

[54] 397 U.S. 358 (1970).

[55] *Id.* at 364, *cited in* Alaphonso, 1 Fed. St. Micr. Intrm. at 218.

> We may not . . . conclude . . . simply by determining the accepted meaning in the United States of words included in the Constitution of the Federated States of Micronesia.
>
> As already noted the Constitution's Judicial Guidance Section instructs that we may not follow blindly decisions of the United States or other courts. This cautionary note should be kept in mind even in applying the above method of constitutional interpretation for provisions within the Declaration of Rights. Before accepting an interpretation of United States courts concerning the meaning of words in this Constitution, we must review the reasoning of those courts and determine whether that reasoning and the results reached are suitable for the Federated States of Micronesia.[56]

The second protection is a timing limitation, which diminishes the import of decisions made by the U.S. Supreme Court after July 12, 1978, the date of the plebiscite.

> The framers of this Constitution, and subsequently the voters in ratifying could only have been aware of constitutional interpretations rendered prior to and at the times of the Constitutional Convention, and ratification of the Constitution through plebiscite. We should therefore emphasize interpretations in effect at those times.[57]

The greatest protection, however, is the empowerment of citizens inherent in the Court's scrupulous effort to apply statutes and constitutional provisions precisely and to spell out its reasoning fully and

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[56] *Alaphonso*, 1 Fed. St. Micr. Intrm. at 219. The Court then reviewed the three reasons given by the U.S. Supreme Court in *Winship* for holding proof beyond a reasonable doubt as an essential prerequisite for a criminal conviction. The reasons given in *Winship* are that: (1) there is "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions," *Winship*, 397 U.S. at 361, *cited in Alaphonso*, 1 Fed. St. Micr. Intrm. at 219; (2) the reasonable doubt standard and other related rules of evidence are "historically grounded rights . . . developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property," *Winship*, 397 U.S. at 363, *cited in Alaphonso*, 1 Fed. St. Micr. Intrm. at 220; and (3) the standard is "indispensable to command the respect and confidence of the community in applications of the criminal law," *Winship*, 397 U.S. at 364, *cited in Alaphonso*, 1 Fed. St. Micr. Intrm. at 222. The Court found each of these reasons equally acceptable within the FSM and therefore accepted the reasonable doubt standard for the FSM. *Alaphonso*, 1 Fed. St. Micr. Intrm. at 223.

[57] *Id.* at 216 (citations omitted).

carefully. If citizens of the FSM find a particular principle of law announced by the FSM Supreme Court distasteful or in conflict with Micronesian values, that principle can be overruled by statute or constitutional amendment. The Court has made clear that it will apply constitutional and statutory directions carefully.[58] Perhaps it need hardly be added that no such protections would be available under a system where judges are prepared to "give a less rigorous reading" to constitutional and statutory provisions in order to "do right," as they see it.[59]

IV. CUSTOM AND INDIVIDUAL RIGHTS

The Judicial Guidance Clause contains an inherent ambiguity, perhaps even contradiction. It is fine to say that "[c]ourt decisions shall be consistent with this Constitution, [and] Micronesian customs and traditions,"[60] so long as custom and tradition and the Constitution are consistent among themselves.

Obviously, however, conflicts may arise. Nowhere is conflict more likely to occur than when traditional leaders seek to punish persons. Punishments can be meted out in many forms. Examples may range from stripping a person of a high traditional title or abrogating rights to land, to direct physical beatings, as were inflicted on two young Yapese males, Joseph Tammed and Raphael Tamangrow.[61]

Messrs. Tammed and Tamangrow were accused of separate incidents of sexual assault, one within four months of the other. Each was tried and convicted, in separate proceedings, of sexual assault. In both sentencing hearings before the trial court, it was disclosed that, before their arrests and convictions, persons from the villages of the victims had beaten the defendants in retribution for the sexual assaults. The defendants asked the trial court to reduce their sentences based upon the "customary beatings" which had taken place. The trial court in each case stated specifically that the beatings would not be taken into consideration in mitigation of the sentences because to do so might encourage others "to take the law into their own hands."[62] The defendants appealed.

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[58] *See, e.g., Semens*, 2 Fed. St. Micr. Intrm. at 139 ("[The Court] may not simply adopt interpretations of similar words in other constitutions to determine the meaning of this Constitution without 'independently considering suitability of that reasoning for the Federated States of Micronesia.'") (citing *Alaphonso*, 1 Fed. St. Micr. Intrm. at 213).

[59] *See supra* notes 43-44 and accompanying text.

[60] FED. ST. MICR. CONST. art. XI, § 11 (Judicial Guidance Clause).

[61] Tammed v. Fed. St. Micr., 4 Fed. St. Micr. Intrm. 266 (App.1990).

[62] *Id.* at 269.

It was immediately apparent that this appeal presented important issues. In an earlier case, the trial division had been asked to dismiss a criminal prosecution in Pohnpei, against the opposition of the state prosecutor, because the clans of the defendant and the victims had met and reconciled in the traditional manner, over *sakau*, a libation powerfully symbolic of peace and harmony in Pohnpei.[63] Although declining on grounds, among others, of prosecutorial discretion, to dismiss the prosecution over the opposition of the state prosecution, the court did approve the custom, integrating it into the criminal justice system.[64] Customary apologies are now considered as mitigating factors in sentencing proceedings.[65]

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[63] Fed. St. Micr. v. Mudong, 1 Fed. St. Micr. Intrm. 135, 137 (Pon. 1982).

[64] *Id.* at 148.

[65] The *Mudong* court expressed approval of the purposes of the customary apologies and found that the custom and the constitutional criminal justice systems played complementary roles:

> Micronesian custom, and the constitutional legal system established by the people of the Federated States of Micronesia, flow from differing (not necessarily inconsistent) premises and traditions. They serve different purposes.
>
> Ponapean customary law flows from an island tradition of interdependence and sharing. It de-emphasizes (compared to the constitutional legal system) notions of individual guilt, rights and responsibility, and places greater stress on the groups to which the individual accuseds and victims belong. Families, clans and community groups are the principal subjects and objects of customary law. Major purposes of a customary forgiveness are to prevent further violence and conflict, to soothe wounded feelings, and to ease the intense emotions of those most directly involved so that they can go about their lives in relative harmony.
>
> The constitutional legal system, paradoxically, concentrates upon both smaller and larger units than those intermediate groups emphasized by customary law. This legal system's procedures are calculated to focus upon the individual accused. Grounded upon a premise of individual responsibility, the court system seeks to pinpoint one particular act or series of actions and to determine whether an individual accused is guilty of the crime.
>
> At the same time, the constitutional legal system also must consider the more generalized interests of the larger society. The Court should respond to and implement this nation's more abstract notions of justice, applying the criminal law to preserve order and respect for law throughout the state and the Federated States of Micronesia. The view of the constitutional legal system is to be toward and from all of society, not just the communities of the defendants and the victims.
>
> The two systems, then, can be seen as supplementary and complementary, not contradictory. Each has a valuable role to perform, independent of the other. There may often be opportunities

Customary punishments, however, are much more problematic than customary apologies. Determinations of guilt are required. The Constitution provides:

> The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf.[66]

A governmentally sanctioned punishment normally implicates constitutional protections against unreasonable seizures, deprivations of liberty without due process, and cruel and unusual punishment.[67] If we were to "approve," or even to acquiesce in, physical beatings, would this not indeed "encourage" additional beatings, as the trial court had feared? Would affirmation or acceptance of the practice mean that punishments for criminal offenses could be decided upon and carried out completely outside the constitutional criminal justice system, thereby obviating constitutional guarantees? On the other hand, denouncing or prohibiting a bona fide customary practice presumably would be "inconsistent" with customs and traditions and violative of the Judicial Guidance Clause. Even a failure to integrate a customary punishment into the criminal justice system, or a refusal to acknowledge a custom as legitimate could highlight the tension inherent in the Judicial Guidance Clause, perhaps raising legitimate concerns among Micronesians as to the feasibility of their effort to adopt a constitutional system which would respect their institutions and values.

I appointed to serve with me on the Yap state appellate court Chief Justice John Tharngan, a Yapese nonlawyer steeped in the customs and traditions of Yap, and Guy Powles, Jr., a widely respected professor teaching a course in Pacific Islands law at the University of Monash School of Law in Melbourne, Australia. In a previous incarnation, Professor Powles had served as a judge in Western Samoa.

> for coordination or mutual support, but there appears no reason why one system should control the other.

Id. at 144-45 (citation omitted).

[66] FED. ST. MICR. CONST. art. IV., § 6.

[67] In 1991, the FSM Supreme Court held that the actions of a police officer in burning a convicted prisoner with a cigarette, and in kicking and beating him, constituted cruel and unusual punishment. Plais v. Panuelo, 5 Fed. St. Micr. Intrm. 179, 197-98 (Pon. 1991).

We convened in Yap and heard oral argument on the *Tammed* case there. This was in keeping with the Court's normal policy of hearing appeals in the state where the case arose rather than in the national capital on Pohnpei. The immediate concerns about the seriousness of the case were confirmed by oral argument and our review of the briefs and record in the case. In the first place, it was obvious that these were not mere ritualistic ceremonies but instead were harsh and dangerous beatings."[68]

Moreover, counsel for the government, a member of the Yap State Attorney General's office,[69] stated that if the crimes at issue had been

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[68] The beatings are described by the *Tammed I* Court as follows:

> 1. Joseph Tammed - Tammed committed his sexual assault against the victim, a high school student, on March 15, 1988.
>
> Ten days later, on March 25, 1988, relatives of the victim lured Tammed to a waiting vehicle, forced him into it, and drove him to the home of the victim's father where he was severely beaten. Aside from kicking and punching Tammed, his captors paid special attention to the hand which they referred to as having wandered mischievously and having held an alleged threatening weapon, a knife. Pinning the hand down, they smashed it with a two-by-four wood piece, breaking several bones in his hand and fingers. There is some question whether his hand ever will heal properly. At various times during the ordeal, Mr. Tammed's captors taunted him, threatened him with weapons and urinated upon him.
>
> Bleeding from his nose and an ear, and with a smashed and broken hand, Tammed finally was left on the road to find his own way home.
>
> 2. Raphael Tamangrow – Tamangrow committed his sexual assault on July 25, 1988, accomplishing the unlawful sexual penetration by inserting the barrel of an air gun within his victim's vagina, producing mortal fear in her.
>
> On July 31, 1988, Tamangrow was abducted from his village by fellow villagers of the victim. He was then beaten with fists and coconut fronds, kicked and slapped, all with a severity similar to the attack upon Tammed. After this beating, Tamangrow was immediately hospitalized, and remained there until August 5, 1988.
>
> Hospital records indicate that upon admission, Tamangrow's eyes were swollen shut. There was general swelling of his face, lips, neck, back and both arms. He had bruises on most parts of his upper body and extremities. He was conscious, but vomited when he tried to consume water, and therefore was given intravenous feeding. Urinary difficulties also ensued and a catheter was inserted to drain his bladder.

Tammed, 4 Fed. St. Micr. Intrm. at 269-70.

[69] The sexual offenses committed by Tammed and Tammangrow were major crimes and, therefore, fell within national jurisdiction under the National Criminal Code. However, the national government did not have the capacity to investigate and prosecute all major crimes. The national government had, thus, entered into agreements with the offices of the attorneys general of the four states, whereby those offices were effectively

violations of state instead of national law, Yap would have declined to prosecute the cases because the customary punishments had taken place. In addition, counsel made it clear that on occasion Yap State police officers, acting in their individual (that is, their non-official, customary) capacities, participated in customary beatings.

Yap Attorney General Cyprian Manmaw, a bright and dedicated Yapese strongly committed to upholding the customary system in Yap, had long opposed national jurisdiction over major crimes under the National Criminal Code,[70] contending that the criminal justice system for each state should be designed and controlled by the people of that state.[71] By this time, it was apparent that national jurisdiction over major crimes was on the way out. Therefore, the Yap state government would have full control over the criminal justice system.

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deputized to enforce the National Criminal Code. Thus, state attorneys routinely appeared before the national court on behalf of the national government.

[70] The national government was originally given authority to legislate concerning major crimes. FED. ST. MICR. CONST. art. IX, § 2(p). Pursuant to that authority, the FSM Congress enacted the National Criminal Code, 11 F.S.M.C. §§ 101-1401 (Pac. Island Pub. Co. Laws of the Fed. St. Micr. CD-ROM, 1999), decreeing that any crime permitting incarceration for three years or more was a major crime. 11 F.S.M.C. § 902(1) (2001); *see also* Tammow v. Fed. St. Micr., 2 Fed. St. Micr. Intrm. 53, 56 (App. 1985). Very quickly, a call arose, particularly from Yap, for more local control. Consequently, the threshold for "major" crimes was raised, first to five years, then to ten, by amendments of the National Criminal Code. This, however, did not stem the tide. One of the three constitutional amendments implemented as a result of the 1990 Constitutional Convention restricted the legislative power of the FSM Congress under Article IX, §2(p) to "national" instead of major crimes. Fed. St. Micr. Const. Conv., Comm. Proposal 90-13, S.D. 1 (adopted Aug. 29, 1990), http://www.fsmgov.org/congress/bills/constit/90-13.pdf (last visited Jan. 12, 2002) (repealing power of national government to define major crimes).

[71] I considered the Major Crimes Clause and the National Criminal Code consigning jurisdiction over major crimes to the FSM Supreme Court very important to the success of unified self-government by the people of the FSM. Given: (1) the novelty of constitutional government in the FSM, (2) the few FSM citizens formally trained in the law (even today only about ten are lawyers), and (3) the tremendous pressures that can be generated in a small island community to convict or, conversely, to stifle prosecutions against high ranking and powerful wrongdoers, I thought broad national jurisdiction offered the greatest likelihood of providing an efficient, fair, trusted and sensitive criminal justice system.

I had discussed this issue several times with Yap Attorney General Manmaw and was aware that one of his purposes in calling for local control was to protect custom and thereby to preserve the Yapese way of life. We both always recognized that Yap, which has a form of caste system, posed special challenges to the effort to reconcile customary law and individual rights, such as equal protection. Of course, the "states' rights" advocates prevailed in the national debate.

Under the policy of the attorney general's office, the Yap state government would act only when customary punishments had not been carried out. In many cases, then, custom would determine what actions are punishable, who should be punished, and what punishment would be administered. The state's approach seemed quite likely to be helpful in supporting traditional powers, so long as the powers were not employed abusively. However, this amounted to an abdication of state responsibilities in those instances when customary punishments did occur. Constitutional and statutory protections of civil rights ostensibly were rendered irrelevant. There was no announced plan to monitor punishments, either to assure that the punishments were indeed in some real sense in accordance with custom or tradition, or to assure compliance with constitutional standards. In reality, we feared the policy of the Yap attorney general's office was tantamount to abandonment of the Declaration of Rights.

It would be satisfying to relate that we developed an incisive and comprehensive approach, which resolved these tensions among customs and constitutional rights, the quandaries of federalism, and the complexities of sentencing. Unfortunately, that is not the way the law generally works, and the FSM Supreme Court did not provide a final definite solution to all the social and governmental issues implicated in the *Tammed* case.

All members of the *Tammed* panel shared the view that the Court should have much more information before attempting to rule on customary punishments in any ultimate way. We also felt that creative and satisfying solutions to the apparent conflicts are more likely to be reached through discussions and cooperation rather than in a judicial setting. Thus, we addressed the case cautiously and respectfully. We set out to decide the issues directly presented as narrowly as possible, offering perspective and some guidance concerning the surrounding issues so that the new governments and the longstanding traditional and customary groupings might have time to adjust and develop solutions consistent with the Constitution and Micronesian customs and traditions, as the Judicial Guidance Clause directs.

A. *The Sentencing Issue*

The threshold question was whether this was indeed a conflict between custom and the Declaration of Rights or whether the beatings were simply unlawful actions taken by groups of villagers. Although there were "references in the presentence reports, affidavits and representations by counsel all suggesting that the beatings may have been

carried out as a result of, or in compliance with local custom[,]"[72] and "[a]ll parties and the [trial] court proceeded on that assumption,"[73] the fact remained that "there was no specific evidence concerning custom[,]"[74] and the record "reflect[ed] no serious effort by any party in either case to establish the precise contours of customary punishments . . . ."[75]

It therefore became necessary to consider both possibilities. Analysis began by determining that:

> [I]f the beatings perpetrated upon the defendants were regarded as having been carried out informally, as a kind of vigilante activity, without any customary implications at all, the trial court would have been required to give them careful consideration in each case and, in absence of some compelling reason to the contrary, to give the beatings some mitigative effect.[76]

Moving from this premise, the Court found even stronger reasons for considering customary punishments:

> To the extent that these beatings were grounded upon, or were products of custom and tradition, it is even more apparent that the court was not free to bar them from consideration. The Constitution and the National Criminal Code both send clear signals to this Court that when a customary law or practice is raised, we are required to proceed with great care. The court must seek to assess the precise nature and implications of the practice and to arrive at a solution that does not pose unnecessary conflicts between custom and the FSM Constitution or statutes. Article V of the Constitution sets the tone, confirming that, "Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition . . . ." [citing FED. ST. MICR. CONST. art. V, § 1]
>
> It has been pointed out that the intent of the framers in adopting the judicial guidance clause . . . was to place

[72] *Tammed*, 4 Fed. St. Micr. Intrm. at 268-69.

[73] *Id.* at 269.

[74] *Id.* at 268.

[75] *Id.* at 270.

[76] *Id.* at 278.

> "affirmative obligations upon an FSM Supreme Court justice in every case that comes before this Court. Our decisionmaking must be grounded upon a new basis which will allow the consideration of the pertinent aspects of Micronesian society and culture." [citing Semens v. Continental Airlines, Inc., 2 Fed. St. Micr. Intrm. 131, 139 (Pon. 1985)] This "affirmative obligation" is not limited to those cases in which counsel or parties assert that a principle of custom or tradition applies. Instead, "the Court has an obligation of its own to consider custom and tradition." [*Id.*]
>
> The constitutional provision of the most direct significance in this case is article V, section 2, which empowers Congress to protect traditions by statute. Congress exercised that power in enacting the National Criminal Code, explicitly mandating this Court to recognize custom in sentencing: "The Court shall . . . give due recognition to the generally accepted customs prevailing in the Federated States of Micronesia." [citing National Criminal Code, 11 F.S.M.C. § 1003.] The "applicability and effect of customary law in a criminal case . . . shall be determined by the Court." [*Id.*] At the very least, these provisions place on the sentencing court advised of a customary practice or action potentially relevant to the sentence, an "obligation to conduct proceedings . . . with scrupulous care and sufficient sensitivity to avoid diminishing unnecessarily" respect for custom and traditional practices.[77]

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[77] *Id.* at 278-79 (citations omitted). This holding was based in great part on an Australian Federal Court decision reversing a trial court's refusal to give mitigative effect to the previous punishment of an aborigine defendant, who had been speared in the abdomen by his fellow tribesmen. Mamarika v. Regina (1982) 42 A.L.R. 94, *cited in Tammed,* 4 Fed. St. Micr. Intrm. at 277-78. Although spearing is often meted out as a matter of aboriginal custom, the Australian Federal Court noted that there was no evidence that all customary requirements had been met for this particular spearing. *Id.* Still, the *Mamarika* court concluded, mitigative effect should be given:

> [T]his Court should approach the matter on the basis that, by reason of his actions, the appellant brought on himself the anger of members of the community and that as a result he received severe injuries from which he fortunately made a good recovery. So seen, it is a matter properly to be taken into account in determining an appropriate sentence, without giving any sanction to what occurred. . . .

Id. at 278.

The case was remanded to the trial court for resentencing, with the following instructions:

> [Tlhe court shall first take into consideration and give mitigative effect to the beatings inflicted on them, without regard to the customary implications.
>
> No further steps shall then be called for unless one or both of the defendants, after being apprised of the court's new sentence, requests that further mitigative effect be given to reflect the customary nature of the beatings. In response to any such request, the court shall consider further evidence submitted by the parties, and may supplement that evidence through court-appointed assessors, in order to determine whether these were indeed customary punishments. If so, the court shall consider whether additional mitigative effect should be given these punishments to reflect their customary nature, but such additional mitigation shall be granted only if the court is satisfied that adjustment of the sentences to reflect judicial respect for the customary nature of the punishments would be consistent with the Constitution, including the relevant parts of the Declaration of Rights.[78]

B. *Customs and Constitutional Protections*

The *Tammed* Court also advised that customary practices could not be assumed to obviate concern about rights provided under the Declaration of Rights:

> Lest we be misunderstood, and interpreted as holding that this Court and other governmental officials must affirm and support custom in all of its manifestations, we are compelled to point out that the judicial guidance clause requires that our decisions be consistent not only with customs and traditions but with the balance of the Constitution as well.
>
> Measured against that mandate, the kinds of beatings inflicted upon Messrs. Tammed and Tamangrow raise profound and fundamental issues about law enforcement in the Federated States of Micronesia.

[78] *Tammed*, 4 Fed. St. Micr. Intrm. at 284.

> The record suggests that the beatings were carried out by young men from the villages of the victims. There has been no showing of any careful steps taken in advance to assure that the people to be beaten were in fact the perpetrators of the sexual assaults. Nor has there been any indication that those who carried out the punishment were selected on the basis of their prudence, responsibility, judgment or self-restraint. Although there is no direct evidence on the point, the record is open to the possibility that the avengers were entirely self-selected, so that those who participated would have been the persons in the respective villages who most enjoy beating and humiliating helpless victims, or those who were most personally and intensely outraged by the sexual assaults. Obviously, neither set of characteristics would be conducive to a responsibly administered, proportionate punishment.
>
> Indeed the record is devoid of proof that any mature, detached, responsible or titled traditional leader: (1) carefully confirmed either the identity of the wrongdoer or the propriety of a customary punishment; or (2) prescribed the scope of the punishment in advance; or (3) supervised the beatings or took steps of any kind to guard against excessive enthusiasm on the part of the attackers.
>
> In adopting the Declaration of Rights as part of the Constitution of the Federated States of Micronesia and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause, that determinations of guilt are arrived at fairly, and that punishments for wrongdoing are proportionate to the crime and meet prescribed standards.
>
> Obviously, there are serious questions of law and fact as to whether these punishments directly violated any of these constitutional protections of the defendants and whether any court approval of these beatings would be violative of judicial obligations.[79]

C. *The State Action Issue*

[79] *Id.* at 281-82 (footnotes omitted).

The *Tammed* Court expressed the following concerns about the policies of the state of Yap:

> There is an even greater need for caution in this case because of the apparent policies of Yap state officials concerning these kinds of customary punishments . . . .
>
> [G]overnment counsel during Mr. Tammed's sentencing hearing indicated to the trial court that if the office of the Yap attorney general makes a determination that a particular punishment has been carried out "in accordance with Yapese custom," then that office "would not file the charges" if the underlying criminal offense was a violation of state rather than national law.
>
> This practice . . . amounts to a substitution of the customary punishment in place of the judicial proceedings and punishment contemplated by the Constitution and state statutes. Under the policy of the Yap attorney general's office, beating is no longer just a customary punishment, but also serves as the entire official state trial and punishment for that specific offense. The traditional leaders who authorized the punishment, and the village members who carried it out, may well be transformed through this ratification into governmental agents or officials.
>
> Adoption of a particular beating may work the other way as well, rendering the governmental officials, through their approval or certification of the punishment, customary decision makers and agents. By embracing the customary punishment as fulfillment of their own prosecutorial and governmental responsibilities, governmental officials may effectively make themselves participants in the punishments meted out pursuant to custom. This policy of the office of the Yap attorney general runs the risk of so identifying the Yap state government with attacks upon individuals, which state officials could not carry out directly, as to transform those customary punishments into action of the state.
>
> In the present cases, the partnership between the government and those carrying out customary punishments is not established quite so indisputably. In contrast to its policy for state law violations, the government does not entirely abdicate its national law prosecutorial responsibilities in deference to customary punishments.

> Yet, even for national law violations, it is evident that state policy, at the very least, is to acquiesce in customary punishments of offenders. Counsel advised the Court in oral argument that because the beatings of the defendants were considered to be customary punishments, no prosecution had been undertaken against the assailants.[80] In addition, there is some indication that police officers participated directly in the beatings and that government policy is to permit such conduct by police officers who are related to victims.[81]

In light of all these considerations, the *Tammed* Court added the following instructions to the trial court:

> [I]f upon remand the trial court is asked to give special mitigative effect to these beatings to reflect their customary nature, the court must first consider whether these customary activities have become so imbued with official state action that actions of the assailants must be viewed as actions of the state itself. If that is so, the punishments must be tested by the same standards that would be applied if state officials themselves were to carry out these punishments directly.
>
> In the same vein, the trial court should keep in mind that its own authority to give special approval, in the name of respect for custom, to beatings administered to punish offenses for which the National Criminal Code prescribes specific punishments, is quite limited. This is especially true of course when the customary beatings which the court would endorse are decided upon and carried out by methods that violate the constitutional guarantees provided for persons accused and convicted of crimes. Judicial action bears the "clear and unmistakable imprimatur of the State," Shelley v. Kramer, 334 U.S. 1 (1948), and a court wishing to support custom may not endorse private actions

[80] This reminder of possible criminal prosecution to those responsible for the beatings was supplemented by a footnote, stating, "[o]f course, the proper setting for directly assessing and responding to a beating allegedly carried out in violation of civil rights would be in an action brought pursuant to 11 F.S.M.C. 701." *Id.* at 284. The statute cited is the FSM's civil rights legislation, comparable to 28 U.S.C. § 1983 and related sections.

[81] *Id.* at 282-83 (citations and footnotes omitted).

> which violate the letter or the spirit of specific provisions of the Constitution.
>
> Thus, upon remand, the court must consider these beatings and may give them mitigative effect without regard to whether the beatings were in violation of the criminal law or of the civil rights of the defendants. This does not constitute approval of such beatings, but instead is based upon general principles of individualized sentencing and is in furtherance of the goal of assuring a sentence that justly reflects the offense and the circumstances of the defendant.
>
> However, the Judicial Guidance Clause prohibits giving special effect to the beatings to reflect respect for their customary nature, unless the court finds that such recognition would be consistent with the protections guaranteed to individuals by the Declaration of Rights.[82]

The final returns on this tension between constitutional guarantees of individual rights and promises of governmental respect for customs and tradition are not yet in. Upon remand, the trial court, as instructed, gave mitigative effect to the beatings, without regard to their customary or noncustomary nature.[83] Defendants did request that the beatings be given special mitigative effect because of their customary nature.[84] However, after considering the evidence presented on the issue, Justice Benson, sitting as the trial court, concluded that the evidence was insufficient to establish that the punishments were in accordance with customary requirements.[85] No appeal was taken from that decision.

Certainly, the *Tammed* decision was not dispositive of the root issues. Even the sentencing issue was not fully and finally decided. The panel agreed that the trial court should have taken the beatings into consideration in sentencing, but we were unsure whether the beatings were in fact customary. We were convinced that it will be important for court systems within the FSM to decide how to respond to beatings that are in fact "customary," but we believed that more information and reflection was needed to determine what response would be appropriate.

Although we knew tensions were inherent in this case, it also was clear that there was far too much we did not know. What in fact is a

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[82] Id. at 283-84 (footnote omitted).

[83] Fed. St. Micr. v. Tammed, 5 Fed. St. Micr. Intrm. 426, 428 (Yap 1990).

[84] *Id.* at 428-29.

[85] *Id.* at 429-30.

customary punishment? What makes it "customary," as opposed to a simple beating? When, under custom, is it appropriate to invoke a physical punishment? How is it decided? Should a court follow the approach of the Yap attorney general's office, imposing no sentence if a customary beating has occurred? On the other hand, should a court increase its sentence in response to a customary beating, in order to show respect for the customary judgment that the crime was sufficiently serious to require a customary response?

In *Federated States of Micronesia v. Mudong*,[86] the FSM Supreme Court saw its own sentencing activity as independent of, although complementary to, customary apologies, but said that it would reduce sentences when customary apologies had occurred.[87] This was in part in order to encourage customary apologies. Do the Judicial Guidance Clause and Article V of the Constitution require the court to attempt to encourage customary punishments as well?

Resolution of these issues will require dialogue among traditional and governmental leaders. One particular goal could be to determine whether traditional leaders feel that it is important that customary punishments occur and, if so, why. The answer to this of course should not be assumed. It may be possible that such practices are merely a continuation of former practices. It also may be possible that the impetus for customary beatings may come from persons in the community other than the chiefs, and that the chiefs merely have acquiesced in such practices for lack of any concrete reason to stop the practice.

If traditional leaders do believe that continuation of customary punishments is desirable, traditional leaders and governmental officials should explore why this is so. Is it because of a lack of confidence in the constitutional legal justice system? Is this in turn based on a perception that communities are unsafe? If so, those concerns should be discussed, and consideration should be given to the possibility of adjusting legislative authorizations, law enforcement actions, and court pretrial detention and sentencing practices to respond to these concerns.

On the other hand, is it possible that traditional punishments are being used primarily as a way for the local community or traditional leadership to assert greater control and to demand respect? Institutions typically seek self-strengthening devices, and there is no reason why this should be different for traditional leadership. If this is an important purpose of customary punishments, could that same benefit be obtained in some way that does not include physical violence or possible violation of

[86] *Mudong*, 1 Fed. St. Micr. Intrm. at 135.

[87] *Id.* at 145-48.

constitutional standards? Could traditional leaders be involved more closely in the criminal justice process? If traditional leaders believe they are sufficiently certain as to the identity of an offender to justify a customary punishment, would they be willing simply to turn over their information to government officials if they knew that prompt action would be taken?

V. CONCLUSION

The FSM Supreme Court has known from the beginning that the need to integrate the two systems is the primary challenge facing the Court. The Court has grappled with the issues in deciding how to interpret the Constitution, in considering whether to borrow common law principles, and in addressing potential clashes between customary practices and protections of individual rights under the Declaration of Rights. Guidelines have been established but development of the law will, and should, proceed carefully, on a case-by-case basis.