Washington International Law Journal

Volume 21 | Number 2

3-1-2012

A Battle Between Law and Society in Micronesia: An Example of Originalism Gone Awry

Brian Z. Tamanaha

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Recommended Citation

Brian Z. Tamanaha, *A Battle Between Law and Society in Micronesia: An Example of Originalism Gone Awry*, 21 Pac. Rim L & Pol'y J. 295 (2012).
Available at: https://digitalcommons.law.uw.edu/wilj/vol21/iss2/3

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

A BATTLE BETWEEN LAW AND SOCIETY IN MICRONESIA: AN EXAMPLE OF ORIGINALISM GONE AWRY

Brian Z. Tamanaha[†]

Abstract: Two conceptions of the relationship between law and society appear to compete: the idea that law mirrors society and the notion that a gap exists between law and society. Both ideas have some truth—law is an imperfect mirror of society. For various reasons, law and society can fall out of sync or even come into conflict. The 1975 Constitutional Convention, which led to the formation of the Federated States of Micronesia ("FSM"), marked the beginning of a battle between that society and its legal institutions. The Constitution's framers strove to preserve traditional Micronesian culture by ensuring it a respected place alongside modern legal doctrine. Competing influences, however, conflicted with traditional norms. Despite the reluctance of the framers, the laws of the United States supplied the language for key provisions of the Constitution, and U.S. legal precedents strongly influenced judicial interpretations of the Micronesian Bill of Rights and other constitutional provisions. This put the legal system in tension with Micronesian norms, and the ensuing battle between law and society continues to this day. Yet law need not battle society, even when the social and legal systems, with inconsistent norms and competing systems of power, are poised to clash. Whether or not they battle depends largely upon the attitudes toward each system taken by the actors involved.

I. INTRODUCTION

Two often-repeated notions run through law and society research: one, that law is a mirror of society, and two, that a gap exists between law and society. The first notion, in its extreme form, suggests that the relationship between law and society is so intimate that it is incorrect to interject the conjunction "and" between these terms—law is always integrated within and produced by society, and society courses through every aspect of law, such that they cannot be separated. The second notion, in its extreme form, suggests that law operates within but is autonomous from society—a self-defining and self-constituting complex of socially constructed legal practices, institutions, knowledge, and systems of communication and language.

Although many law and society scholars accept both propositions as virtual truisms, an evident tension, if not outright contradiction, exists

[†] William Gardiner Hammond Professor of Law, Washington University School of Law. Former legal counsel for the Micronesian Constitutional Convention of 1990; former Assistant Attorney General for the State of Yap, Federated States of Micronesia. A version of this article will be published later this year by Cambridge University Press in The Social and Political Foundations of Constitutions, Mila Versteeg and Denis Galligan, eds., Cambridge University Press, forthcoming 2012.

between them, for they stake out antipodal positions on the law-society relationship. Contradiction is avoided by eschewing the extreme form of each. The middle ground—adopted by most scholars—relies upon a positivistic understanding to identify law as the law-related activities of legal professionals and legal officials (picked out from society in this specific sense), while also acknowledging that law is always infused with and subject to social influences and factors. Under this common understanding, law is separable from society, contrary to the extreme mirror position, while law is also continuously subject to pervasive social influences, contrary to the extreme autonomy pole.

Even with this moderate view, however, the tension remains. How can it simultaneously be held that law is a mirror of society and that a gap exists between law and society? The short answer is that law is an imperfect mirror of society. Law can be mismatched with, or be out of sync with, society in various ways for various reasons. Mismatch occurs when law lags behind rapid social change or when law fails in an effort to produce social change. Mismatch occurs when law from one society is imposed upon or transplanted to another society. Mismatch occurs when society is comprised of different normative groups and the law reflects a selected group but not others. In these and other situations, when law is manifestly not a reflection of society, the gaps typically are seen as aberrations or defects, as temporary, as a failure or flaw, as a deviant legal condition that will or must be rectified—in the long run at least.

This way of thinking about the well-known "gap problem," as it is called in the socio-legal literature, is a product of the notion that law is a mirror of society: the perception of a gap is dependent on the expectation of a mirror. That is, it is precisely the background belief that law reflects society that supplies the implicit assumptions that allow a mismatch or inconsistency between law and society to be seen as (merely) a "gap."

In this article, I will explore an instance of law engaging in a pitched battle with society. This is a fascinating story worth telling in its own right, which will reveal interesting insights about law and society. Talks of "mirrors" and "gaps" are metaphors which constrain how we perceive the interaction between law and society. Sometimes these metaphors are entirely inapt.

The battle I refer to emerged at the 1975 Micronesian Constitutional Convention and continues to this day.

II. THE BATTLE LINES AT THE CONSTITUTIONAL CONVENTION

The convention was held under the auspices of the United States, through its administration of Trust Territories of the Pacific Islands, a United Nations mandate created at the close of World War II to help territories previously under Japanese colonial rule achieve independence. Micronesia consists of hundreds of small islands across a vast expanse of the tropical equatorial region in the Western Pacific Ocean, stretching nearly 2,000 miles from the Philippines toward Hawaii. Beginning in the late-nineteenth century, much of the region was successively ruled by foreign powers: Spain, Germany, Japan, and the United States. The convention was Micronesians' long awaited exercise of collective self-rule; it was the first concrete act on the road to political independence.

Delegates from several discrete island groupings within Micronesia (each with their own languages and cultures)—the Marianas, the Marshalls, Palau, Yap, Chuuk, Pohnpei, and Kosrae—were brought together in Saipan to draft a constitution that would then be submitted to the electorate for a vote. The convention was scheduled for ninety days in session with a break in the middle to allow delegates to return home for rest and feedback from constituents. The delegates were supported by a convention administrative staff: fourteen interpreters to assist those with limited English (the language of the convention), and a twenty-six-person Research and Drafting Section which prepared committee reports, drafted constitutional provisions, and was responsible for much of the written product of the convention.[1]

The bulk of the discussion at the convention focused on basic political and institutional design choices: number of national legislators from each state and the voting system; bicameral or unicameral house; parliamentary or presidential system; single or plural executive and method of selection; respective powers of the executive, legislative, and judicial branches (including allocation of jurisdiction between state and federal courts); respective powers of state and national governments; taxing power; division of revenue (mainly U.S. aid money) among the federal government and the several states; citizenship and suffrage rights; and method of constitutional amendment. A separate contentious political conflict at the convention revolved around the insistence of the Palau delegation on a set of non-negotiable demands, including placement of the national capital in Palau (Palau and the Marshalls later chose not to join the Federated States of Micronesia, preferring self-standing independence). Issues surrounding land

[1] NORMAN MELLER, CONSTITUTIONALISM IN MICRONESIA (1985). This excellent firsthand account of the convention supplied the background information in this section.

ownership were also prominent, including an intense debate (and several votes) over the government's power to seize property through eminent domain; this was a contentious issue because Micronesian cultural systems are directly tied to the land and because the Trust Territory Administration had taken land under circumstances the Micronesians considered unfair.[2] Another very important political debate revolved around what role—if any—traditional leaders would have in the national government. This was a crucial and delicate debate because traditional leaders were (and remain) influential in Micronesian societies, and a lack of support from traditional leaders, it was feared, might lead voters to reject the constitution.

The battle between law and society that I refer to did not involve any of these political and institutional design issues. Rather, the battle emerged in connection with two intersecting issues: the impact on custom and tradition of the proposed bill of rights (and the constitution generally), and how judges would interpret the constitution and laws.

A. The Explicit Protection of Custom and Tradition

The desire to preserve custom and tradition was a widely shared concern which had special salience in connection with civil rights and with judging. While the delegates supported civil rights, they worried that these rights might operate to the detriment of custom and tradition. Micronesians have a hierarchical, communitarian-oriented society, not a Western individualist society, which several provisions of the Bill of Rights reflect. To alleviate this concern, an early draft of the Bill of Rights was amended to specifically include a provision "which will be equal in rank with the other Bill of Rights to protect and preserve our Micronesian customs, traditional laws and morality."[3] In support of this provision, a delegate explained that it would speed the work of the convention "if there [were] a provision in there, [because] it [would] eliminate unnecessary and lengthy debate concerning the relationship of custom and traditions to every civil right's [sic] measure that would come[] up for consideration on the floor of the Convention."[4]

An early draft of this protective measure stated:

---

[2] *See, e.g.*, Chief Bossy, Convention Del., Remarks on Eminent Domain (Aug. 16, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 136 (1976) ("Many of my people have had the misfortune of owning beautiful parcels of land which the Trust Territory Government wanted, and the government took, through the exercise of . . . eminent domain.").

[3] Jacob Sawaichi, Convention Del., Remarks on Special Committee Report No. 2 (Aug. 16, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 134-35 (1976).

[4] *Id.* at 135.

> Protection of Micronesian Tradition. The traditions of the Micronesian people may be protected by legislation and administrative action taken pursuant thereto. If challenged as violative of any of the provisions of this [Bill of Rights], the essentiality of the Micronesian tradition protected may be considered as a compelling social purpose warranting such governmental action.[5]

Notwithstanding the apparent thrust of this proposal to accord protection to custom, a delegate opposed it on the astute grounds that it appeared to grant courts the authority to hear challenges against custom, and the language ("may be considered . . . compelling") implied the power to rule against custom:

> I feel this amendment clearly indicates, to me, that every time an alleged violation of our traditions and customs is taken to the court, the court's ruling is final and that ruling prevails. This means to me, further, Mr. President, that should a court in Micronesia rule against tradition and custom, one by one, our tradition and custom will undergo a very, very slow death. These customs and traditions which we are supposedly attempting to protect will slowly disappear from the face of Micronesia.[6]

To eliminate this concern, the final enacted version changed "may" into "shall," as follows: "[i]f challenged as violative of [the Bill of Rights], protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."[7]

B. The Judicial Guidance Clause

The second front in the battle was a pointed effort to restrict courts to Micronesian sources of law—to finally end the dominance of U.S. law in Micronesia after decades under Trust Territory courts employing American judges who applied U.S. law. As one delegate remarked, "I wish to point out that in the past the Trust Territory Courts have copied to a great extent

---

[5] Comm. Proposal No. 4, Providing for the Preservation of Local Customs, *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 148-49 (1976).

[6] Leo A. Falcam, Convention Del., Remarks on Committee Proposal No. 22 (Oct. 25, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 149 (1976).

[7] FSM CONST. art. V, § 2. In earlier drafts, this provision was included within the Bill of Rights, but it was later taken out and combined with the provision on the powers of traditional leaders to create a separate article specifically dealing with traditional rights.

English common law which I sometimes think is not relevant here in Micronesia."[8] A delegate proposed two separate provisions to achieve this effect. The first proposal stated:

> The interpretation of this constitution shall not be made in the light of any other constitution known in Micronesia, immediately before the effective date of the constitution.[9]

The intention behind this provision, as attributed to its proponent, was "that . . . the Micronesian courts [not] interpret the Micronesian Constitution in the same way as interpreted by the courts of another jurisdiction whose constitution contained identical or similar language."[10]

As will be revealed in the course of this article, this observation is of crucial significance in the battle between law and society. It evidences clear awareness on the part of the delegates that the language of constitutional provisions borrowed from the U.S. Constitution is likely to be interpreted relying upon U.S. court decisions, and it manifests a strong desire to reject this practice of interpretation.

A second provision was proposed as well:

> Commencing with the effective date of this constitution, all common law, foreign to Micronesia, shall cease to exist. All legal interpretations shall henceforth be drawn from this Constitution.[11]

The explained intention behind this proposal, in part, was a desire "to build up a body of Micronesian common law, through court decisions based on Micronesian customs and traditions and the total social and physical configuration of Micronesian life."[12]

There is no mistaking the sentiment behind these two proposals, which evince a heartfelt determination to halt the dominance of U.S. law in Micronesia. The Research and Drafting Section softened these proposals out of worry that that they would hamstring courts by prohibiting them from drawing upon anything not stated in the Constitution or statutes. They were rephrased from mandatory prohibitions to instead allow courts the freedom to consider other sources of interpretation and other bodies of law, while still

---

[8] Hans Wiliander, Convention Del., Remarks on Special Committee Report No. 2 (Aug. 16, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 420 (1976).

[9] Misc. Commc'n No. 23, *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 349, 351 (1976) (Letter from Norman Meller, Dir. of Research & Drafting, to Hon. Tosiwo Nakayama, Micronesian Const. Convention President (Oct. 13, 1975)).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 352.

emphasizing that appropriateness for Micronesian circumstances remained paramount.

The version that made it to the floor merged the two foregoing proposals into one:

> Judicial Guidance. Decisions of Micronesian Courts shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. Decisions of the Trust Territory Courts, and the common law of other nations, are not binding precedents.[13]

However, an amendment was proposed to delete the second sentence on the grounds that it was problematic and unnecessary. It was potentially problematic in the view of some delegates because a significant body of law had been built up in the preceding decades as well as by foreign courts which could be a useful source of law for Micronesian courts to consider (albeit not as binding precedent). The main opposition was that the second sentence was unnecessary. As one delegate put it, "the new courts are not going to be bound as a practical consequence of having adopted the new Constitution by the previous decisions of courts. We need not say that. To say it means that we are overly worried about something we should not be concerned about."[14] He added that explicitly stating that they are not bound by the decisions of other courts—given that it is self-evidently true—"only shows our sense of insecurity."[15] Over a delegate's objection that the second sentence serves as a useful reminder, the convention voted to enact only the first sentence, which became the "Judicial Guidance Clause," Section 11 of Article XI on the Judiciary.

C. The Impenetrability of Technical Legal Language

The third battle line was drawn around the fact that important constitutional provisions had obscure legal meanings and implications. This was not a problem with respect to the political and institutional design issues mentioned earlier, all of which were fully debated and crafted in accordance with the directions of the delegates. Yet several crucial provisions, including the entire Bill of Rights, were drafted by the legal staff, borrowing language

---

[13] Committee Proposal No. 22, Proposal Relating To Judicial Guidance, *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 419 (1976).

[14] Johnson Toribiong, Convention Del., Remarks on Committee Proposal No. 22 (Oct. 25, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 420 (1976).

[15] *Id.* at 421.

from the U.S. Constitution and court decisions. The accompanying committee reports explained these provisions in a highly technical manner.

This issue came to a head when, on the sixty-fifth day of the convention, a group of traditional leaders requested a one-week postponement on consideration of the Bill of Rights to allow them the time to absorb the dense, legalistic twenty-page committee report that explained the provisions. The delegate requesting the delay noted a general problem with legal terminology at the convention:

> There are times that we may think and feel that we have understood important issues—and all of a sudden we find ourselves wondering why we voted yes or no on a particular matter. I am very much concerned that the language we are using in this Convention is a second language to all of us and is not well understood by most of us, if not at all. These are highly technical, highly abstract issues written in a language unfamiliar to most of us so I can sympathize with the efforts of the traditional chiefs in attempting to make sure that they fully appreciate and fully understand what they are adopting and making a part of the Constitution of our new government.[16]

Two delegates separately objected that the committee report was filled with citations to U.S. cases and was extremely difficult to comprehend, and, furthermore, that the oral explanations provided by the legal staff who drafted the report did not help clear up matters.

In response to these general complaints, the Director of Research and Drafting, Norman Meller, explained to the convention floor that problems of this sort are inevitable when legal language is borrowed:

> Language which is being used in the Constitution has meaning. The exact meaning will be determined by Micronesian courts after the Constitution goes into effect. Meanwhile, to assist the Delegates to understand both its possible scope and limitations, reference has been made to the practices of other countries. . . . With regard to the Declaration of Rights portion of the Constitution, U.S. cases have been used as examples of interpretation. This is because the United States was a pioneer in the inclusion of a Bill of Rights in a national constitution and it is common for other countries to look to American

[16] Leo A. Falcam, Convention Del., Remarks on Proposed Delay (Oct. 10, 1975), *in* 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 311 (1976).

> experience. I hasten to add that this is *not* the same thing as saying the courts in those countries are, or in Micronesia, will be, bound by those American decisions. . . . If desired, staff will eliminate all references to judicial decisions in materials we prepare. Unfortunately, if called upon to answer questions on the possible legal meaning of phraseology, whether or not a case is referred to by name, the knowledge of how the courts have interpreted that language must be availed of by staff in responding, if their response is to be as accurate as they can make it.[17]

To appreciate the magnitude of this problem and to comprehend the extent to which the delegates were mystified by the legal terminology, it is necessary to read an excerpt of the committee report that accompanied the proposed Bill of Rights. While reading the excerpt, keep in mind that English was a second language for the delegates, most of whom had little or no legal training. The proposed due process and equal protection clause read: "No person shall be deprived of life, liberty or property without due process of law nor be denied equal protection of the laws."[18] The report follows this proposed constitutional language with ten explanatory paragraphs. Here is one of the paragraphs:

> While procedural due process requires governmental decision-making to conform with the concept of what is fair and just, substantive due process, on the other hand, addresses the rationality of the legislature. With substantive due process, the court basically looks at the rationale or legitimacy of the governmental interest. In subjecting a statute to the requirements of substantive due process, the court asks: (1) Does the government have power to regulate the subject matter? If the statute is not within the power of the government, the statute will be struck down. For example, inasmuch as public monies cannot be expended for other than public purposes, a fortiori, an exercise of the taxing power for merely private purposes is beyond the authority of the legislature. Loan Association v. Topeka, 20 Wall. 255 (1875); Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937).

---

[17] Misc. Commc'n No. 23, *supra* note 9, at 350.

[18] Standing Comm. Rept. [SCREP] No. 23, *in* 2 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 793, 795 (1976) (Comm. on Civil Liberties, Comm. Proposal No. 14, Bill of Rights).

> (2) If the government has the power to regulate, the court next asks if what the statute proposes to do bears a rational relationship to the implementation of the legislative goal. Another way of asking the same question is, "Can any reasonable legislature choose this particular statute to achieve its goal?" In subjecting a statute to this second test, it must be pointed out that the statute is presumed to be valid. The challengers of the statute must bear the burden of proving that the statute is devoid of any rational basis. Additionally, with respect to economic measures, the courts do not substitute their social and economic beliefs for the judgment of legislative bodies. Munn v. Illinois, 94 U.S. 113 (1877); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963). (3) Finally, where the statute involved arguably infringes upon individuals' fundamental rights, the court must ask how important is the legislative objective. In other words, where fundamental rights are involved, the court resorts to balancing the legislative goals against the fundamental rights which would arguably be infringed if the statute were to stand. The court must ask if there is a compelling governmental interest to justify holding the statute valid, even though the statute might limit fundamental rights. The burden of proving compelling governmental interest shifts to the government. The presumption is in favor of protecting fundamental rights, until the government proves a compelling justification to so curb these rights. Such presumption also protects against irrational application of valid statutes.[19]

One can admire the valiant effort of the legal staff to condense the complex constitutional doctrine of substantive due process into a single paragraph, while still recognizing that this passage, which assumes a great deal of background legal knowledge, would be impenetrable to most non-lawyers who read it (all the worse for non-native English speakers). To understand this passage one must know about, at minimum, the distinction between procedure and substance, the rational relation test, the balancing test, what burdens of proof and presumptions are, what fundamental rights are, and how to measure a compelling government interest. Now imagine twenty pages of this sort of text, which comprised the committee report on

[19] *Id.* at 796.

the Bill of Rights, and the dilemma confronting the delegates becomes apparent.

That is why the delegates protested. They were fully aware, and deeply discomfited, that they were giving their imprimatur to *constitutional* words that would be interpreted and applied—words that would bind future law-makers and citizens—in ways they could not fully grasp. The concern generated by this lack of comprehension was magnified by the fact that the committee report was filled with reference to U.S. cases, contrary to the expressed desire of the delegates to be freed of the dictates of U.S. law (as manifested in the aforementioned Judicial Guidance Clause).[20] Nonetheless, in response to their complaints, the delegates were in effect told by the legal staff, "that is how law is." Legal terminology has the capacity to carry and convey its own meaning that can be impervious to penetration.

What is remarkable is that the future Micronesia Supreme Court did precisely what the delegates feared and endeavored to prevent—it adopted a broad swath of U.S. law. In a cruel twist of events, the very delegates who labored mightily to sever the subservience to U.S. law were later to become the authority that judges invoked when adopting U.S. law.

To provide a foretaste of the next phase of the battle, which will be taken up in the following section, it is useful to note here that the paragraph quoted above was recited in an opinion by Supreme Court Chief Judge Edward C. King in a case deciding whether a governmental immunity bar to a medical malpractice suit infringed upon the Due Process Clause. The details of the case are not relevant here. What matters is how Judge King utilized the above passage. Immediately after quoting the above passage from the committee report, he asserted,

> This explanation reveals that the *framers anticipated* that, depending on the nature of the rights involved, one of two different kinds of tests would be applied to determine whether a particular governmental regulation or statute which affects life, liberty or property is consistent with the constitutional demand for 'due process of law.'"[21]

Proceeding to apply the two tests (in the name of the framers), King continued in the same vein, asserting that "it appears quite likely that the *framers anticipated* that other rights, not specifically referred to in the

---

[20] *See supra* Part II.B.

[21] Samuel v. Prior, 5 FSM Intrm. 91, 101-02 (Pon. 1991) (emphasis added).

declaration of rights, would be protected as fundamental rights under the Due Process Clause."[22]

The *legal staff* that authored the report might have anticipated these things. However, in light of the concerns expressed by the delegates about the impenetrability of the legal terminology—and their complaints about this committee report in particular—it seems well warranted to assert that *the delegates* anticipated nothing of the sort. In a book recounting the convention, Norman Meller highlighted this reality:

> All Convention actions occurred within a constraining paradigm of language and law which most delegates could vaguely sense, but about which I was acutely aware and could do little. Everything formally said and written was in English, the official language of the Convention, as was all personal intercommunication between delegates not hailing from the same district. Interpreters labored to bridge the gap between the vernaculars of their principals and the complex English within which ideas frequently took shape, try as staff might to simplify the language employed. But there was a problem beyond interpretation or minimizing the use of "legalism," for all of the English terminology employed was technical in the sense that it depended upon a warp and woof of historical concept and legal experience with which few of the delegates were adequately conversant, regardless of their English-speaking abilities.
>
> To give specificity to the words employed, and being trained in American law, the staff referred to American practice and judicial construction of meanings. As a matter of course, they shaped delegate and committee proposals, as well as the supporting rationale contained in committee reports, within the general conceptual frame of a common law jurisprudence.[23]

When discussing this problem, Meller—the head of Research and Drafting—writes as if the legal staff had no real option: "What other course could the staff have followed in an area which for over three decades had been and was yet being administered under the usages of the English language as embodied in American legal practice?"[24]

---

[22] *Id.* at 102 (emphasis added).
[23] MELLER, *supra* note 1, at 196.
[24] *Id.*

The legal staff was indeed grappling with a difficult task. Yet other options were available at hand, as Meller acknowledges, in existing constitutional models from other Pacific Island countries like Fiji and Western Samoa.[25] Choices were made by the legal staff, choices shaped by assumptions taken from their American legal training.

Moreover, while the legal staff assumed the posture of merely formalizing into legal language the desires of the delegates, they did much more than that. In some instances they were active agents who shaped the substantive thrust of the constitutional provisions. This is evident in Section 4 of the Bill of Rights: "Equal Protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status."[26] This is far more expansive than the Equal Protection Clause of the U.S. Constitution. Meller justified the additional categories as reflective of "the additional meanings accreted elsewhere over time through court interpretation."[27] Setting aside the question of whether this was indeed an accurate restatement of U.S. equal protection law (rather than the legal staff's ideal version of equal protection law), the crucial point is that this *new* language inserted by the legal staff carried within it potentially fundamental implications for Micronesian culture and society. To state just the two most obvious areas, Micronesian cultures have radically different gender roles and relations from those in the United States, and they are hierarchical societies (for example, Yap has a caste system). The explicit inclusion of "sex" and "social status" potentially threatens these deep cultural values in uncertain and unknowable ways. This is why, as Meller recognized, one of the most contentious issues was "basic conflict on the floor touching the quick of Convention emotions regarding the primacy of traditional rights over the civil liberties more recently introduced into Micronesia."[28]

Thus, the battle between law and society was joined. The delegates appeared to prevail on behalf of society in this crucial engagement by including a provision that would explicitly protect custom and tradition when a clash arose with the Bill of Rights, and by including the Judicial Guidance Clause to require judges to develop a Micronesian body of law. Yet none of this would ensure that their wishes would be heeded, as the delegates seemed to sense, owing to the immanent potential of legal terminology to exert its own meanings.

---

[25] *Id.* at 197.
[26] *Id.*
[27] *Id.* at 245.
[28] *Id.* at 198.

III. "THE FRAMERS" OF THE CONSTITUTION IN COURT

The Constitution was ratified three years after the convention, in 1978 (the intervening delay was caused by U.S. objections to certain provisions in the draft), and the new nation was called the Federated States of Micronesia ("FSM"). Edward C. King and Richard Benson were appointed in 1980 as the first two judges on the national court—called the FSM Supreme Court—by the first President, Tosiwo Nakayama. The Court began to function in May 1981. It was divided into trial and appellate levels; as there were only two judges at the time, the judge who did not hear the case at trial would preside on appeals, along with two temporarily appointed judges sitting by designation to hear the case. Benson and King were American expatriate lawyers, both of whom had spent time in the region prior to their appointment, Benson as a judge on nearby Guam for several years, King as an attorney for four years in the Micronesian Legal Services Corporation based in Saipan. The judges whom King and Benson invited to sit by designation on appellate panels ranged from local state judges to American federal court judges. Given this arrangement, it was inevitable that the approaches taken by Judges King and Benson would substantially shape the jurisprudence of the new nation.

Judge King, in particular, embraced his mission to build a body of law for the country. The focus herein will be limited to his decisions as they relate to the battle between law and society traced out in this article—his work at the intersection of custom and tradition, the Bill of Rights, subservience to U.S. case law, and the Judicial Guidance Clause.

A notable aspect of Judge King's analysis was his frequent and heavy reliance on "the framers" when justifying his decisions. In his eleven years on the court, from 1981 to 1992, King referred to "framers" in thirty-six separate opinions. This exceeds the combined total references to "the framers" (twenty-seven in all) in opinions written by all the other judges on the court from 1981 through 2007 (five judges have secured permanent appointments to the Supreme Court since its inception). There is nothing untoward in referring to the framers. One of the main tasks of the new court was to work out the implications of the new Constitution, and one way for judges to work this out was to consider the purposes of the people who prepared it. However, two oddities stand out regarding Judge King's analysis: his references to "the framers" hardly resemble the delegates who were actually at the convention, and time and again his invocation of the framers served as a prelude to (and justification for) the adoption of American law.

One of King's very first decisions, when sitting as a trial judge in a criminal prosecution, considered the issue of whether evidence seized by police without a search warrant can be used in the criminal case against a defendant. The relevant constitutional provision reads: "The right of the people to be secure in their persons, houses, papers, and other possessions against unreasonable search, seizure, or invasion of privacy may not be violated."[29] As King noted, this clause, which is modeled on the Fourth Amendment of the U.S. Constitution, does not specify how to determine what makes a search "unreasonable," nor what should happen to evidence obtained in constitutionally inappropriate searches. "We must probe further," King continued, "to determine the full *meaning of the framers* in employing this constitutional language."[30] King then pointed to the Journal of the Constitutional Convention:

> The Journal in this instance . . . provides unmistakable direction. The Micronesian Constitutional Convention's Committee on Civil Rights proposed the Declaration of Rights in substantially the form subsequently incorporated within the constitution. . . . The proposed language and supplemental discussions in the Committee Report reveal that in developing the Declaration of Rights for the Constitution of the Federated States of Micronesia, the Committee, and subsequently the Convention itself, were drawing almost exclusively upon constitutional principles under United States law.[31]

This would prove to be a fateful analytical move. For the next step—which came after Judge King noted the substantial similarity between the wording of the U.S. Search and Seizure Clause and the FSM Search and Seizure Clause—followed almost inexorably from the first:

> Thus, the Journal of the Micronesian Constitutional Convention teaches that, in interpreting the Declaration of Rights in the Constitution of the Federated States of Micronesia, *we should emphasize and carefully consider United States Supreme Court interpretations of comparable language in the Bill of Rights of the United States Constitution*. We therefore turn to these decisions for aid in determining the meaning of the word "unreasonable" and in framing principles to be employed in upholding the protection against

---

[29] FSM CONST. art. IV, § 5.
[30] FSM v. Tipen, 1 FSM Intrm. 79, 83 (Pon. 82) (emphasis added).
[31] *Id.* at 83 (internal citation omitted) (citing Standing Comm. Rept. No. 23, *supra* note 18).

> unreasonable search proclaimed in Article IV, Section 5 of the Constitution of the Federated States of Micronesia.[32]

Judge King then launched into an exegesis of U.S. constitutional search and seizure doctrine, extensively quoting from or citing sixteen U.S. Supreme Court cases. He ended up adopting the U.S. reasonableness analysis for the FSM.

In the bootstrapping style characteristic of common law legal analysis, this case, *FSM v. Tipen*, would later be cited (frequently by King himself) for the propositions that the similar language in the U.S. and Micronesian Bills of Rights suggest that U.S. case law should be considered. King did not mention the Judicial Guidance Clause in his decision, the objections from delegates at the convention about the heavy reliance on U.S. case law in the committee report, or their complaints that they could not apprehend the legal explanations in the report.

This was the beginning of a pattern Judge King would reiterate multiple times. An early appellate opinion issued the same year, *Alaphonso v. FSM*, which considered what burden of proof is required in criminal cases, introduced a twist on this pattern involving the Judicial Guidance Clause. At the outset of the opinion, King chastised the lawyers for their omission:

> The parties here have . . . merely cited legal authorities from the United States, including decisions of United States federal and state courts, without explaining why those authorities are pertinent to these issues before this Court.
>
> 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."[33]

King quoted two passages from the report attached to the Judicial Guidance Clause explaining the desire of the delegates to shape a body of law suitable to Micronesia, rather than blindly follow Trust Territory cases and U.S. law. In later cases, Judge King would often cite *Alaphonso* for the

---

[32] *Id.* at 85 (emphasis added).

[33] Alaphonso v. FSM, 1 FSM Intrm. 209, 212 (Pon. 1982).

proposition that the Court paid due regard for the unique circumstances of Micronesia.

In the case itself, however, after his extended homage to the Judicial Guidance Clause, Judge King immediately veered in a different direction. He noted that the Due Process Clause in the FSM Constitution says nothing about the burden of proof in criminal cases; he noted the parallel language between the Due Process Clauses in the U.S. and FSM constitutions; and he noted that in the committee report attached to the Due Process Clause "the Committee relied principally upon decisions of the United States Supreme Court . . . . The obvious lesson is that we are to look to the interpretative decisions of United States courts concerning the Due Process Clause of the Fifth Amendment of the United States Constitution."[34] Thus, following his nod to the Judicial Guidance Clause, King arrived on familiar ground, citing ten U.S. cases, adopting the beyond-a-reasonable-doubt standard for the FSM.

In the course of his analysis, Judge King made a seemingly odd remark that he treated as highly significant:

> 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.[35]

Judge King touted, and often later repeated, this cut-off date as an essential "protection" for Micronesians—"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."[36]

This remark is odd for several reasons. King's careful locution—they "could only have been aware" of a U.S. precedent in existence at the time they voted—is logically unassailable (of course they could not possibly know of anything that did not exist then). However, the soundness of his assertion that pre-1978 precedents carry greater import depends upon the correctness of one or both of the following positive assertions: that the delegates and voters *were in fact aware of* or that they *did in fact intend that*

---

[34] *Id.* at 215-16.

[35] *Id*. at 215 (emphasis added).

[36] Edward C. King, *Custom and Constitutionalism in the Federated States of Micronesia*, 3 ASIAN-PAC. L. & POL'Y J. 249, 266 (2002).

greater weight be given to U.S. precedents then in existence. Neither assertion is remotely true.

It is a pure pretense to suggest that the delegates had any *awareness* of U.S. constitutional decisions at the time. As described earlier, the delegates struggled to understand the legal explanations prepared by the legal staff for the Bill of Rights.[37] None of the U.S. cases Judge King cited in *Alaphonso* (and in many other decisions King later wrote following this analysis) were actually mentioned in the committee report. Judge King's cut-off date is the mid-1978 ratification by voters, which is a abuse of fact and reason. It borders on deception to imply that the voters had any knowledge of or intention about pre-vote cases. The delegates at least had an opportunity to review the committee report (never mind understand it). However, the people, the mass of Micronesians in villages and towns (many with limited English and education) who voted to ratify the Constitution had no exposure to it and had no idea what it contained. Leading up to the vote, there were public meetings and general education programs about the proposed constitution, but there was no detailed legal analysis, which the people may not have been able to understand anyway.

As for their actual intent, the delegates had repeated their fervent wish to halt the practice of blind obedience to U.S. precedent, although they permitted consideration of U.S. decisions for whatever insight they might offer to Micronesian judges.[38] Remember, on this point, that several delegates explicitly *complained* about the presence of citations to U.S. Supreme Court cases in the committee report attached to the Bill of Rights, which prompted the Director of Research and Drafting to offer to excise the U.S. cases (although he said it would be pointless). The delegates, with their unmistakable intention, would have attached no significance to when the U.S. precedent was decided, whether before or after the convention, because under all circumstances, U.S. precedents were not to be binding—that is exactly what the delegates had said. All U.S. precedents would have the same weight: they were information for the Micronesian judge to consider.

The crucial distinction Judge King drew between pre- and post-ratification U.S. cases was meaningless with respect to what the delegates and voters actually knew, and it was contrary to what they actually intended. It was an elaborate gesture of self-abnegation on the part of Judge King (and other judges who have repeated it) to maintain the veneer that his decisions comported with the consent of the people as embodied in their drafting and adoption of the Constitution. (This was a "gesture" rather than a genuine

[37] *See supra* Part II.C.
[38] *See supra* Part II.B.

limitation because, notwithstanding his assertion, Judge King regularly cited post-1978 U.S. cases anyway.)[39] He would point to the "protection" provided by the cut-off date as a significant mark of the genuine independence of the Micronesian court from obedience to U.S. law.

Alaphonso became a template for future cases. Judge King would begin with a nod to the Judicial Guidance Clause; then he would note the similarity in language between the U.S. and FSM constitutional language and mention that the committee reports cited U.S. cases; next, he would engage in extensive discussions of U.S. case law; finally, he would conclude by adopting U.S. legal approaches. Following this mode of analysis, he adopted U.S. doctrines of judicial review,[40] search and seizure,[41] vagueness in criminal statutes,[42] abstention,[43] voluntariness in confessions,[44] and common law claims,[45] among other legal doctrines.[46] On occasion, King rejected prevailing U.S. law, but rarely on the grounds that it was unsuitable for Micronesian circumstances—he simply appeared to disagree.[47] In this manner, he steadily built up a body of law that closely resembled U.S. common law and individual liberties analysis.

At times, Judge King's analysis of the framers was perfunctory and conclusive. In a case in which the defendant argued that the police could not search an open field without a warrant, Judge King noted that since *Hester v. United States*, decided by the U.S. Supreme Court in 1924, the law was clear that warrantless open field searches do not violate the Fourth Amendment.

> The framers of the Federated States of Micronesia Constitution looked to United States court decisions to determine the meaning to the words they were selecting for the declaration of rights in this Constitution.

---

[39] *See*, *e.g.*, United Church of Christ v. Hanno, 4 FSM Intrm. 95 (App. 1989); FSM v. Jonathan, 2 FSM Intrm. 189 (Kos. 1986).

[40] Suldan v. FSM, 1 FSM Intrm. 339 (Pon. 1983).

[41] FSM v. George, 1 FSM Intrm. 449 (Kos. 1984).

[42] Laion v. FSM, 1 FSM Intrm. 503 (App. 1984).

[43] Panuelo v. Pohnpei, 2 FSM Intrm. 150 (Pon. 1986).

[44] FSM v. Jonathan, 2 FSM Intrm. 189 (Kos. 1986).

[45] Semes v. Continental Air Lines, Inc., 2 FSM Intrm. 131 (Pon. 1985).

[46] An excellent survey of the Court's jurisprudence is provided in Dennis K. Yamase, THE SUPREME COURT OF THE FEDERATED STATES OF MICRONESIA: THE FIRST TWENTY FIVE YEARS (2006), *available at* http://www.fsmlaw.org/fsm/rules/FSMSupCt25YrsforPDF.pdf.

[47] *See* Federal Business Development Bank v. SS Thorfinn, 4 FSM Intrm. 367 (App. 1990) (declining to follow U.S. precedent that foreclosure on ship is not within maritime jurisdiction); Aisek v. Foreign Investment Board, 2 FSM Intrm. 95 (Pon. 1985) (adopting the concrete adversary requirement of standing doctrine, but rejecting the nexus requirement); *see* Samuel v. Prior, 5 FSM Intrm. 91 (Pon. 1991) (refusing to recognize medical malpractice claim, although other common law claims previously recognized).

> The searches here fall within the Hester open fields doctrine. *There is no reason to doubt that the framers intended for that doctrine to apply here.*[48]

Contrary to King's assertion, it is unequivocally clear that the delegates had no intention at all about the matter. Needless to say, the *Hester* decision and the open fields doctrine were never mentioned at the convention—and the committee report (which King cites) on this particular provision of the Bill of Rights does not actually refer to any U.S. cases.[49]

Most of the time, Judge King invoked the framers to draw a positive warrant for the incorporation of U.S. case law, but in a few instances he found no evidence of framers' intent, which allowed him to avoid following U.S. precedents. In a case involving whether the enforcement of a mortgage on a ship is within the Court's admiralty jurisdiction, King was confronted with a 150-year-old U.S. Supreme Court precedent that mortgages fall outside admiralty jurisdiction. Judge King cited several criticisms by U.S. legal scholars of this early decision, he emphasized the import of the Judicial Guidance Clause, and then he raised the framers:

> Of course, if the constitutional history of the Federated States of Micronesia revealed that the *framers*, or the *electorate*, in embracing the language of the United States Constitution, specifically intended to adopt the particular interpretation given those words by the United States courts, then we would not be free to seek an alternative meaning. However, the journals of the Micronesian Constitutional Convention reveal no such specific intent concerning the meaning of the words "admiralty or maritime."[50]

In light of his general approach, this is an astonishing passage. In none of the cases discussed above in which King relied upon framers' intent to adopt U.S. case analysis was there any evidence of specific intention to support his reliance. In all of those cases—for example, whether the Due Process Clause requires the beyond-a-reasonable-doubt standard—the Constitution and Journal of the Constitutional Convention were silent, suggesting that no one had thought about the issue. Indeed, the strongest evidence of intention that bears on the issue was the general desire of the

---

[48] FSM v. Rosario, 3 FSM Intrm. 387, 388-89 (Pon. 1988) (emphasis added) (citation omitted) (citing Standing Comm. Rept. No. 23, *supra* note 18, at 793).

[49] *See* Standing Comm. Rept. No. 23, *supra* note 18.

[50] Federal Business Development Bank v. SS Thorfinn, 4 FSM Intrm. 367, 372 (App. 1990) (emphasis added).

delegates that the future court not slavishly follow U.S. precedent, a desire which Judge King largely frustrated.

Another telling case raised the issue of the standing requirements plaintiffs must meet to bring suit. Issues about standing to sue are not addressed in the Constitution and were not raised at the convention. Per usual, Judge King began with a reference to the import of the Judicial Guidance Clause, then made this strongly stated assertion: "Many provisions of this Constitution are derived from the United States Constitution and the framers surely intended that interpretation of the words adopted would be influenced by United States decisions in existence when this Constitution was adopted, in October 1975, and ratified on July 12, 1978."[51] To the contrary, as argued above, they surely had no such intention. What makes this case revealing is that Judge King wanted to loosen the yoke of U.S. standing law—to adopt the "concrete adverseness" requirement of standing doctrine but not the "nexus" requirement. To provide himself this freedom, King noted that standing law happened to be "a particularly unsettled area of United States law when the FSM Constitution was drafted and ratified."[52] Because it was unsettled, his reasoning went, the framers and voters would not have been certain about the law (in fact they knew nothing about it either way). King then remarked that in 1978, the nexus requirement was limited to taxpayer suits. "Thus ratification of the Constitution can not be seen as indicating an intention by the framers or the people of the Federated States of Micronesia that this additional obstacle to court access be adopted."[53]

Judge King was indisputably correct that the framers and people had no intention to adopt the nexus requirement, but they just as surely had no intention to adopt any of the many doctrines taken from U.S. cases that Judge King positively declared in their name and by their authority. His analysis of the framers erects an elaborate set of fictions, for the delegates and voters had no knowledge about any of this, and gave nary a thought to it. The flesh and blood delegates at the convention were transformed in King's legal analysis into abstract entities who *must have intended* certain things—no matter how remote from their actual intentions—by virtue of the language they adopted and the committee reports they (purportedly) read and understood.

A process of abstraction is often utilized in law to re-describe social situations and events to conform to and serve legal categories and modes of

---

[51] Aisek v. Foreign Investment Board, 2 FSM Intrm. 95, 98 (Pon. 1985).
[52] *Id.* at 99.
[53] *Id.* at 102.

analysis. This is one of the ways law manages, constrains, and channels social influences, sometimes to tame them or stave them off. This is not law acting on its own—Judge King skillfully wielded these modes of legal analysis to implant into Micronesian law legal doctrines he was familiar with and believed in. When so doing, every time Judge King referred to "the framers," he erased the actual identity of the Micronesian delegates and voters and used them to accomplish his own legal ends.

Micronesian law did not have to be built this way, and Judge King did not have to proceed in this fashion. While it makes sense that he would adopt legal tests he was familiar with, and it is entirely appropriate that he would look to U.S. cases for guidance when faced with novel issues, he could have systematically consulted a range of legal sources, especially the constitutions and laws of other Pacific Island countries. He could have taken up each issue on its own terms, evaluating the pros and cons, the relevant policies and principles, as they bear on the government, the law, and the political, economic, geographical, and cultural conditions of Micronesia—indeed, Judge King decided a number of cases in this more open and straightforward fashion.[54] However, to a significant extent, especially early in his tenure, he relied heavily on U.S. cases and engaged in standard American-style legal reasoning. His utilization of framers' intent was disingenuous, thereby building into the jurisprudence of the new nation a strain of fictional legal analysis that survived his departure.

When Judge King retired in 1993, he was replaced as Chief Justice by Andon Amaraich. Amaraich had enjoyed a long career in a variety of high level government positions in Micronesia. Although he did not have a law degree, he had worked as a public defender for ten years. He was also a long-time Congressman under the Trust Territory and the FSM, and he headed the national department of external affairs under two presidents.[55] Directly relevant to this analysis, Amaraich served on the legal staff at the 1975 constitutional convention, drafting a number of the constitutional provisions.

From 1992 until the end of 2007, Judge Amaraich issued seven written opinions that referred to "the framers," far fewer times than Judge King did. His treatment of the framers stands in stark contrast to that of Judge King's. One striking difference is that Amaraich cited far fewer U.S. cases than King. In four of the seven cases mentioning the framers,

---

[54] *See, e.g.*, Semes v. Continental Air Lines Inc., 2 FSM Intrm. 200 (Pon. 1986).

[55] *See* Press Release, Government of the Federated States of Micronesia, The Federated States of Micronesia Mourns the Loss of one of its Founding Fathers: Chief Justice Andon Amaraich (Jan. 28, 2010), *available at* http://www.fsmgov.org/press/pr012810.htm.

Amaraich cited zero U.S. cases; in a fifth and sixth case he cited one and three U.S. Supreme Court cases, respectively,[56] as informative on the issues—but without suggesting that the framers intended to endorse those precedents. In only one case in which he mentioned the framers did Judge Amaraich engage in a significant discussion of U.S. cases; this was a case involving the taxing power. Judge Amaraich considered U.S. tax doctrines (in a separate section labeled "United States Case Law") on their merits for how they might inform his decision, choosing to adopt certain tests for his analysis, but at no point did he link these cases back to the framers' intent.[57] Another striking difference is that when Amaraich discussed the framers' intent, it was in relation to things the framers actually did debate and try to achieve, whereas Judge King's references to the framers tended to be purely abstract discussions of what they must have intended when borrowing U.S. constitutional language. Judge Amaraich also frankly acknowledged that legal questions arose which the framers simply had not foreseen, and he accepted responsibility for making the decision.[58] No abstract framers appear in the pages of Judge Amaraich's opinions.

IV. THE EXISTENTIAL BATTLE BETWEEN SOCIETY AND LAW

While the struggle revolving around "the framers" was concealed in the dry legal analysis of judicial opinions, a remarkable clash between law and society erupted in plain view that exposed the depth of the conflict. In separate incidents on Yap several months apart in 1988, Joseph Tammed and Raphael Tamangrow each committed sexual assault.[59] Ten days after his attack, Tammed was taken by relatives of the victim to the victim's father's house and severely beaten, left with a bloodied face and a broken hand. Tamangrow was likewise seized, a week after his attack, by fellow villagers of the victim, and severely beaten to the point of unconsciousness; he was thereafter hospitalized for five days (adding to his offense was the fact that his victim was of a higher caste). According to members of the community, both beatings were administered as customary punishment.

Tammed and Tamangrow were later separately charged and convicted of sexual assault. At their respective sentencing hearings, they asked the presiding judge, Richard Benson, to reduce their sentences in light of the

---

[56] *See* Pohnpei v. KSVI, 10 FSM Intrm. 53 (Pon. 2001); Pohnpei v. MV Hai Hsiang, 6 FSM Intrm. 594 (Pon. 1994).

[57] *See* Chuuk v. Secretary of Finance, 8 FSM Intrm. 353 (Pon. 1998).

[58] *See, e.g.*, FSM v. Kotobuki Maru No 23, 6 FSM Intrm. 65, 74 (Pon. 1993).

[59] The facts of these incidents are set forth in the consolidated case of Tammed v. FSM, 4 FSM Intrm. 266 (App. 1990).

"customary beatings" they had suffered. Judge Benson refused to consider the beatings, stating:

> The judgments of this court do have an effect on the community and in future cases a group of men taking the law into their own hands can say, "It's all right. The Court lets us handle the punishment." I make that statement not denying that there is apparently, because it's been raised in two cases now, a Yapese custom along these lines.[60]

Both defendants then appealed their respective sentences, arguing that Judge Benson erroneously failed to take their customary punishments into consideration to reduce their sentences.

On Yap, custom and tradition have great importance in social and political life. The Attorney General ("AG") of Yap State, Cyprian Manmaw (now Chief Justice of the Yap State Court, who earned a law degree in the United States and served as AG for twenty years), followed a policy of deference to customary actions. The Yap Attorney General's office supported Tammed and Tamangrow on their appeal; Manmaw would not have brought the original assault charges against Tammed and Tamangrow had the crime been under state jurisdiction because he considered the customary punishment to resolve the matters.

Judge King ruled in favor of the defendants on appeal, finding that Judge Benson should have considered the customary punishments in mitigation of their sentence (citing a similar case from Australia). Yet Judge King spent the better part of the opinion sending a warning to Yap State that it would be held to account if it continued to defer to customary punishments. Here is the critical (threatening) passage:

> 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, as reflected in the record and explained further in oral argument. . . .
>
> For example, government 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.

---

[60] *Id.* at 271.

> This practice of course 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 government agents or officials*. . . .
>
> 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*.[61]

Through the legal-speak, Judge King was saying that if this policy was continued, Yap State could be subject to civil lawsuits for customary punishments, and those who administer the punishment could be subject to suit as well for civil rights violations (in addition to simple battery). To make this message clear, King cited the statutory provision for civil rights claims.[62]

Judge Benson and Judge King held the unshakable conviction that the state has a monopoly over law—and, in particular, a monopoly over the infliction of legitimate violence. This is what Judge Benson was thinking when he feared that men would "take the law into their own hands."[63] This explains why Judge King could assert that the customary punishments might be "the entire official state trial and punishments" and those who carried out the punishments might be "government agents or officials."[64] If one assumes that there is only one legitimate legal system, and that this system resides in the state, then it follows that any *valid* punishments are, by conceptual necessity, *actions of the state* no matter who carries them out.

---

[61] *Id.* at 282-83 (emphasis added).

[62] *Id.* at 284 n.11. In a later article discussing the case, King acknowledged the point of this reminder. *See* King, *supra* note 36, at 278.

[63] Tammed v. FSM, 4 FSM Intrm. 266, 271 (App. 1990).

[64] *Id.* at 282.

The Yapese people saw the law differently. They saw *two* legal systems existing side-by-side, with the state legal system mainly handling affairs of government and business. With respect to social affairs (including property rights, family affairs, and altercations), they believed that customary ways of responding to problems had primacy. That is why Manmaw deferred to customary actions that effectively resolved matters. Owing to this primacy, if it happened that police officers were among the relatives of the victims and hence participated in the customary beatings (as apparently occurred in Tammed's punishment), they were acting as members of the community in their customary capacity—people who just happened to be police officers—not as police officers.

This is an existential battle in the genuine sense that the judges found it unacceptable, a threat to the very idea of law, to be confronted with a competing legal system that people accorded primacy to over state law in certain affairs. Judge King was not troubled by allowing the customary punishments to be considered in criminal sentencing because this meant they operated by leave of and within the parameters established by state law. Judge King's overarching assumption that state law must have primacy was displayed, albeit implicitly, in an article he wrote ten years later, after his retirement from the bench:

> 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 greater 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 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?[65]

His reflections on *Tammed* reveal that Judge King never really understood what was at stake. He could not envision the beatings as anything other than brutal acts of violence. Of course the traditional leaders were interested in maintaining their power within the customary system (much like judges within the state system), as King skeptically suggests, but events cannot be explained in those terms.

Nor was the issue for the Yapese about improving the state legal system to better serve their needs as a community, as King's questions assume. Rather, at issue was nothing less than the continued existence of *their own* thriving legal system, a system they identified with because it was the product of community actions in accordance with norms they all understood. Recall, if you will, the complaints of the delegates at the constitutional convention about the foreign (U.S.) feel and impenetrability of state law. Their customary system raised no similar objections for the Yapese people precisely because it was *their* system.

It is essential to recognize that Yapese society was (and remains) cohesive and well ordered in large part because its customary systems functioned fairly well. Manmaw's policy of deference to the customary system, which Judge King objected to, served to enhance the functioning of both legal systems in their own primary spheres, and helped negotiate their interaction when they intersected.

A final incident will help demonstrate this point.[66] When Manmaw resigned as Attorney General to become Chief Justice, his long-time assistant in the office, Victor Nabeyan, was appointed to replace him. A few months after he took the AG position, Nabeyan, while drunk one day, committed an assault and battery. This was especially embarrassing because the AG is the top legal official in the state. Nabeyan was immediately placed on administrative leave by the Governor. The Governor advised the Speaker of the Legislature that the incident involved family members, different villages, and possible criminal charges, writing:

---

[65] King, *supra* note 36, at 280-81.

[66] This incident and subsequent events is described in B. Gorong, *Victor Nabeyan Remains as Attorney General*, YAP NETWORKER, July 20, 2007, at 4-5.

> As the resolution of these concerns are a mixture of traditional and governmental responsibilities and functions—some more traditional than others, and vice-versa—the Lt. Governor and I, despite our strong desire to resolve the matter quickly, saw it fit to let those concerns we have limited authority over, and those beyond our authority (i.e., family feud, village disputes, and criminal investigation) be resolved first while waiting for input from other branches of the state government.[67]

Nabeyan made a public apology for his conduct, sending the statement to the Traditional Councils of Pilung and Tamol (the main island chiefs, and the outer island chiefs, respectively), as well as to all state officials, and he tendered his resignation to the Governor. Meanwhile, traditional means of reconciliation took place between the individuals and families to heal the rift. The Council of Pilung then called for a special meeting with the Governor and Legislature to express its view that Nabeyan be allowed to remain as Attorney General to manage the state's legal business. "The Council's belief was that the matter was a 'non-issue' for the State because a 'weinig' at the family and village levels had been tendered and accepted and 'harmony between and among villages concerned has been restored.'"[68] The prosecutor's office (in Nabeyan's absence) decided to defer prosecution for battery because the victim refused to press charges owing to the reconciliation. The Council of Tamol sent a letter telling the Governor they supported his decision to reinstate Nabeyan "as long as there should be no conflict between our traditional custom and the State Government."[69] With these various positions arrived at, the Governor lifted the three-week leave of absence, and Nebayan served as AG thereafter.

The handling of this incident is a brilliant example of the effective interweaving, within Yapese society, of traditional customs and processes with modern governmental processes, including state law, each with its own realm and ways, yet working in interaction to find workable resolutions. Judge King could not see the genuine importance of the customary system and how it worked. King was happy to allow the state legal system to recognize customary apologies, but not customary punishment[70]—yet they were all of a piece, a total way of life, that could not be pried apart while maintaining its integrity.

---

[67] *Id.* at 5.
[68] *Id.*
[69] *Id.*
[70] *See* King, *supra* note 36, at 268-69.

This final incident also reveals that, against the theme of this article, law need not battle society, even when the social and legal systems are poised to clash with inconsistent norms and competing systems of power. Whether or not they battle depends to a large extent upon the attitudes toward each system taken by the actors involved—especially the attitudes of state legal officials.

V. THE STRUGGLE BETWEEN SOCIETY AND LAW GOING FORWARD

In 1990, after a decade of independence, a second constitutional convention was held, this time without the United States lurking in the background. Only three amendments were ultimately enacted, two of which were directed at the topics discussed above.

One amendment added a new second sentence to the Judicial Guidance Clause, which now reads (the amendment indicated in italics):

> Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. *In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia.*[71]

This addition was an implicit rebuke of the Court's jurisprudence, and of Judge King in particular. The committee report proposing the amendment reads:

> 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 upon 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.[72]

---

[71] FSM CONST. art. XI, § 11 (amended 1991) (emphasis added).

[72] COMM. ON GOVT'L STRUCTURE & FUNCTION, FSM CONST. CONVENTION STANDING COMM. REP. NO. 27-90, at 2 (1990).

As this explanation indicates, the second sentence added nothing new; it merely emphasizes the point of the first sentence.

A second successful amendment removed legislative power over "major crimes" from the national government and gave it to the states, leaving national power only over crimes of a "national" nature.[73] The effect of this amendment was to divest national courts of jurisdiction over these criminal cases. Under the previous system, the national government would handle all crimes subject to punishment for three or more years (later increased to five years, then ten years), including serious crimes like rape and murder.[74] That is why the prosecutions of Tammed and Tamangrow for sexual assault were handled in the national court system. Following the amendment, state prosecutors and courts have exclusive control over crimes of this sort.

Taking stock of developments thus far, a few conclusions can be drawn with some confidence. Judges King and Benson have departed, and Judge Amaraich recently died. There are currently two sitting national judges, Judge Martin Yinug, a Yapese with an American law degree, and Judge Dennis Yamase, an expatriate American lawyer who has lived and worked in Micronesia for decades. As would be expected after three decades of independence, a substantial body of law has developed. Judicial opinions today are filled with citations to Micronesian cases. Although U.S. cases are cited far less frequently than in the past, behind many of the Micronesian cases lie U.S. precedents, and many of the legal rules and doctrines are derived from the United States.

In this respect, Judge King was extremely effective, and his enduring legacy will not likely be erased. Common law systems tend not to reexamine precedents. Nor is it necessarily desirable that the developed body of rules should be reexamined in a wholesale manner. Legal officials in Micronesia have become accustomed to their jurisprudence and the system operates well. Many of the technical legal doctrines the court adopted, for example rules like abstention and standing, have no implications for Micronesian traditional culture, but are essential to every judicial system and must be worked out. The critical tone of this article should not diminish the genuine achievement of the first generation of judges on the Micronesian Supreme Court.

The struggle between law and society addressed in this article will undoubtedly continue in ways that are impossible to anticipate. Certain constitutional provisions, especially in the Bill of Rights, and certain aspects

---

[73] *See* FSM CONST. art. IX, § 2(p) (amended 1991).

[74] The changes are explained in King, *supra* note 36, at 271 n.70.

of the legal system—including its adversarial style, with winners and losers—are in tension with Micronesian norms. Owing to this structural feature of their society-law relationship there is an ever-present potentiality for conflict.