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## The Constitution and Post-Colonial Identity

The backdrop to the constitutional philosophy of the FSM reflects the dynamics of history as a circular web of social connections. This chapter deals with the *Shulapan allik*<sup>1</sup> (Constitution) of the FSM as the embodiment and perpetuation of *shon Maikronesia* history, identity and continuity, while acknowledging the relevant elements of colonial history. The *Shulapan allik* reconciles internal differences and asserts a distinct politico-cultural perspective and personality.<sup>2</sup> To understand how this perspective developed requires an investigation of four interwoven processes. First, what historical precedents motivated the diverse Micronesian population to share a nation state? Second, what historical factors inspired Micronesian leaders to convince the indigenous population that a constitution was necessary to regain control of their islands? Third, why did the leaders advance the concept of constitutional independence while sidelining economic development as a secondary issue? Fourth, how do Micronesians perceive themselves after the adoption

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1 The concept of *Shulapan allik* is a Mortlockese–Chuukese term referring to the Constitution as the backbone of all laws in relation to the modern FSM state. For an in-depth discussion of modern forms of constitution and theories, refer to Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (2nd edition), The Federation Press, 1998, pp. 4–20. For a specific discussion on FSM Constitutional Federalism, see John Haglelgam, 'Federalism and Multiculturalism. Federalism in the Federated States of Micronesia', Asian Resource Centre for Decentralisation, 2006, pp. 125–138, [localgov.up.edu.ph/federalism-and-multiculturalism-haglelgam-federalism-in-the-federated-states-of-micronesia.html](http://localgov.up.edu.ph/federalism-and-multiculturalism-haglelgam-federalism-in-the-federated-states-of-micronesia.html).

2 See *The Constitution of the Federated States of Micronesia*, Preamble, which conveys the distinct Micronesian identity and perspectives in view of the many islands.

of the Constitution in terms of the ongoing debate between economic and political development as well as jurisdictional issues between the federal and state governments?

These four interrelated questions are central to any discussion of Micronesian identity in a post-colonial era as they facilitate our understanding of Micronesian opposition to the long occupation of Micronesia by foreigners. As will be demonstrated, the ongoing, contested interaction between internal Micronesian priorities and actions on the one hand and external influences on the other continued well after the Constitution came into force. With recourse to detailed legal analysis supplemented by cultural observations, this chapter explores the Micronesian perspective from the dawn of fledgling independence to the FSM's future prospects. It is generally accepted among constitutional law specialists that a constitution is a written document designed to provide the socio-political framework by which a nation is governed. It defines power relations between government organs and the people, as well as the manner in which the constitution can be amended to alter those power relations.<sup>3</sup> The general objective of a constitution is to prevent government tyranny against its people.<sup>4</sup> Colonial tyranny was the backdrop to Micronesians' push to establish a constitution to protect their future interests in line with international standards and to assert the FSM's status as an independent nation, with all the rights afforded to that status. It was reassuring for Micronesians to use the Western concept of a constitution. The FSM's Constitution then became a framework to harmonise and project a united voice for Micronesians. It was also a concept recognised by external powers and presented legitimacy for Micronesian sovereignty.

The Constitution is a living document that reminds the people of their historical past and shields them from emerging threats to their sovereignty. As constitutional scholars Tony Blackshield and George Williams comment, 'if a constitution is written, then, with the passing of time ... the living constitution inevitably comes to be related much as the past is related to the present'.<sup>5</sup> In reflecting the historical past and geographical realities of Micronesia, the Constitution established a government structure referred to as coordinate federalism. This entails that both the states and national government are sovereign within their

3 Blackshield and William, *Australian Constitutional Law and Theory*, pp. 5–7.

4 Peter Hanks, Deborah Cass and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (6th edition), Buttersworth, Sydney, 1999, p. 8.

5 Blackshield and William, *Australian Constitutional Law and Theory*, p. 5.

respective areas of power, 'each is to be free to perform its functions without hindrance by the other governments ... except in the case of concurrent legislative powers (where the national government) prevailed over the states' if state laws are inconsistent with national laws.<sup>6</sup> Political scientist Peter Larmour credited the successful constitution-making in the Pacific Islands to the pre-existing cultural conditions that facilitated the transfer of colonial institutions into the hands of indigenous Pacific Islanders.<sup>7</sup> The Micronesian experience fits Larmour's observations.

Colonisation underscored the uneven power relations between *shon Maikronesia* and the colonial powers. Colonial authorities ignored the rights of the indigenous people as first settlers of the islands and instead annexed the islands into their own externally imposed political structures. The consequence of this alien imposition was the development of a sense of Micronesian unity as a separate, distinct group of people. This shared feeling intensified post WWII, when Micronesians realised that the US's control of Micronesia was perpetuating colonial attitudes and behaviours similar to those experienced prior to the war. The universal awareness that decolonisation was a fundamental right of indigenous people fuelled Micronesians' desire to emancipate themselves from further external control. However, to do so required a constitution for the purpose of gaining international acceptance.

## The Essential Elements of the FSM's Constitutional Model

The search for a constitutional model befitting Micronesians' outlook became the task of the emerging Micronesian leaders post WWII. The leaders envisioned a constitution embedded in *eoranian fanou* (cultures of Micronesia) and supported by international standards.<sup>8</sup> Historically, Micronesians did not have a written legal code. Codes of conduct were handed down orally and enforced through the generations via a system of culture, and post-colonially, through the adopted legal

6 Leslie Zines, *The High Court and the Constitution*, Butterworths, Sydney, 1981, p. 1.

7 Peter Larmour, *Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands*, University of Hawai'i Press, 2005, pp. 36, 41, 70.

8 Post WWII brought dramatic changes in the world order. Micronesian experiences of colonisation were more acute than before, and thus the desire to control their own destiny was also more acute. For general discussion, see David Hanlon, 'Magellan's Chroniclers?', pp. 53–54; Gale, *Americanization of Micronesia*, pp. 67–73.

system. Violations of socially sanctioned behaviours were dealt with in accordance with community standards. The FSM's Constitution acknowledges the various *eoranian fonou* while also providing the legal structure for their reinforcement in the modern world.<sup>9</sup>

The success of the *Shulapan allik* rests on the adaptability of the traditional socio-legal system to deal with the import of modern legal doctrines. The *Shulapan allik* defines who Micronesians are as a people, designates their territorial home and provides the structure and manner of government.<sup>10</sup> The Constitution's ultimate aim is to perpetuate the principles of peaceful coexistence within the FSM's territory and promote the new Micronesian identity internationally.<sup>11</sup> In reflecting the historical past and contemporary realities, the Constitution superimposed a coordinated federalism as the principal form of governance. Under the Constitution, each island (municipality) and island group (state) are free to form their own constitutions without hindrance by the federal government, except in circumstances of concurrent powers, in which case the *Shulapan allik* can be negotiated or else prevails.<sup>12</sup>

The establishment of the *Shulapan allik* meant that the FSM fulfilled the four internationally accepted requirements to become a sovereign nation: 1) a Constitution to protect its population's interests, 2) a population whose desire is to share a common identity, 3) a territory for its residents to live as a free a people and 4) a nation state fully recognised by the international community.<sup>13</sup> The first three elements are explicitly stated in the Constitution's Preamble:

We, the people of Micronesia, exercising our inherent sovereignty, do hereby establish this Constitution of the Federated States of Micronesia. With this Constitution, we affirm our common wish to live together in peace and harmony, to preserve the heritage of the past, and to protect the promise of the future ... We extend to all nations what we seek from each: peace, friendship, cooperation, and love in our common humanity.<sup>14</sup>

9 *The Constitution of the Federated States of Micronesia*, Article II, Section 1.

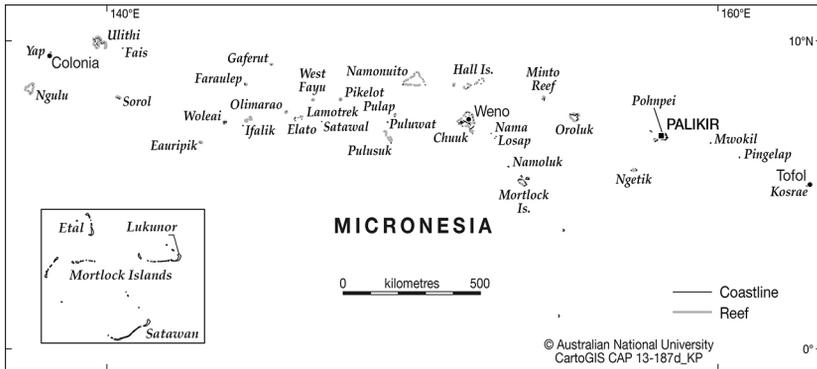
10 Blackshield and William, *Australian Constitutional Law and Theory*, pp. 5–7.

11 Hanks, Cass and Clarke, *Australian Constitutional Law*, p. 8.

12 Zines, *The High Court and the Constitution*, p. 1.

13 The Trust Territory agreement ended in 1986, and the FSM was admitted into the UN in 1991. However, per the terms of the Compact, the FSM is free to have dialogue with the international community to pursue its own political interest, but this must be in line with US interests (Epel Illon, Interview, Palikir, Pohnpei, 13 January 2011).

14 *The Constitution of the Federated States of Micronesia*, Preamble.



**Figure 13: The islands of the Federated States of Micronesia.**

Source: Map produced by ANU CartoGIS.

The FSM's Constitution is *sui generis*<sup>15</sup> as it puts Micronesian customary values at its very heart for the purpose of protecting the integrity and sovereignty of the traditional inhabitants. For example, the *Shulapan allik* obliges the courts to take account of customs and traditions by following the 'geographical and social configuration principle' when handing down decisions.<sup>16</sup> Each municipality is encouraged to maintain their cultural practices as rooted in their historical past.<sup>17</sup> It also acknowledges the hierarchical power structure within local communities and beyond. Devolution of power as traditionally practised is also emphasised with the demarcation of responsibilities between the municipalities, national government and states.<sup>18</sup> The *Shulapan allik* also allocates power to each of the three branches of government (executive, legislative and judiciary) so as to maintain political and social cohesion.

The states and municipalities manage their own affairs by the power of their own constitutions in relation to the national government. The national government in turn represents the states in matters of international concern.<sup>19</sup> Article XIII, Section 3 of the FSM's Constitution requires the state and national governments to cooperate with each other in maintaining the integrity of the Federation:

15 'Sui generis' is a legal term meaning 'of its own kind' or 'unique'.

16 *The Constitution of the Federated States of Micronesia*, Article XI, Section 11.

17 Haglegam, 'Federalism and Multiculturalism'.

18 The demarcation principle approximated the grouping of islands. See Haglegam, 'Problems of National Unity', pp. 5–12; Petersen, *Traditional Micronesian Societies*, pp. 12–13.

19 The FSM Government was modelled on the US Constitution while its features are largely of Micronesian construction. See King, 'Custom and Constitutionalism in the Federated States of Micronesia', p. 3.

it is the solemn obligation of the national and state governments to uphold the provisions of [the] Constitution and to advance the principles of unity upon which [the] Constitution is founded.<sup>20</sup>

The Constitution is the supreme law of the land. No laws, foreign or domestic, usurp its sovereign power.

## The Constitution and the Environment

As previously explored, the Micronesian people live in an oceanic environment where they share common historical experiences. Their national identity comes from the sea. Their territorial seas have been recognised by the international community and must be protected at all times from unscrupulous external threats exploiting their resources. The Constitution is thus the legal instrument that shields Micronesian interests. The Constitution makes it clear that Micronesians are the custodians of their oceanic environment and its resources.<sup>21</sup> Their history is testimony to such a claim, which fundamentally advocates the doctrine of interdependency between the people, sea and land.<sup>22</sup> Micronesians conserved and preserved the environment, which in return provided sustenance for survival. This doctrine influenced Micronesians' social, economic, religious and political affairs. The people derived their sense of identity through genealogy by tracing this identity to specific spaces within the oceanic environment, such as the locales where their clans or extended families originated.<sup>23</sup> Genealogy in turn influenced the way each island conducted its affairs locally, regionally and nationally. These interrelationships collectively shaped how Micronesians engaged with each other.

The national Constitution embraces the preservation of the sea and asks the international community to observe this practice. It speaks of unity, identity and continuity: 'the seas bring us together, they do not separate us. Our islands sustain us. Our island nation enlarges us and makes us

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20 *The Constitution of the Federated States of Micronesia*, Article XIII, Section 3.

21 *The Constitution of the Federated States of Micronesia*, Preamble.

22 The concept of interdependency is widespread in the FSM as the clanship system acts as the people's social security web (Petersen, *Traditional Micronesian Societies*, pp. 22–23).

23 The term '*shon ainang*' is used to trace one's local identity and within the clanship system. See Hanlon, *Upon a Stone Altar*, p. 353; Marshall, 'The Structure of Solidarity', p. 55; Duane, *Clan and Copra*, pp. 59–60.

stronger'.<sup>24</sup> The sea is intimately linked to Micronesian identity, and the Yapese and Chuukese call themselves *remetaw* or *shon metaw* (the people of the deep sea).<sup>25</sup> Micronesians have lived together in harmony within the seas. Colonisers misunderstood the special relationship between Micronesians and the sea. For example, Micronesians were discouraged from sailing during colonial times to prevent the need for costly rescue efforts,<sup>26</sup> prevent warring between islands<sup>27</sup> and divert men's attention from sailing towards land-based food production. However, Micronesians continued to sail the seas despite such restrictions because the sea and seafaring was an essential part of their identity and way of being.<sup>28</sup>

Customary rights of the seas are protected by the Constitution. For example, ownership of reefs and fishing rights beyond the reefs and within the lagoons are traditionally demarcated. These are provided for under Article V, Sections 1–3. Section 1 states:

nothing in this Constitution takes away a role or function of ... custom and tradition, or prevents a traditional leader from being recognized, honoured, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.<sup>29</sup>

Section 2 states:

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.<sup>30</sup>

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24 *The Constitution of the Federated States of Micronesia*, Preamble.

25 Mortlockese called themselves *shon metaw*, which is the same as *re-mataw* often used by the people of the northwest of Chuuk and some of the low-lying islands in Yap. These terms are in reference to people of the sea as emphasised by Paul D'Arcy in his *The People of the Sea*.

26 Hezel, *Strangers in Their Own Land*, p. 108; D'Arcy, *The People of the Sea*, p. 164.

27 Flinn, *Diplomats and Thatch Houses*, p. 25; D'Arcy, *The People of the Sea*, p. 164.

28 In the 1960s and 1970s, sailing canoes were still travelling between islands in the Mortlocks. I have personal experience of this. See also Gladwin, *East is Big Bird*, pp. 134–144; Duane, *Clan and Copra*, p. 258.

29 *The Constitution of the Federated States of Micronesia*, Article V, Section 1.

30 *The Constitution of the Federated States of Micronesia*, Article V, Section 2.

Section 3 ensures that customs and traditions are protected under the guidance of the indigenous leaders:

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.<sup>31</sup>

## Framing of Identities to Constitutionality

Pre-existing regional and local identities are recognised by the FSM's Constitution with the provision for three layers of government, the federal, state and local or municipality. At the municipal level, residents of each island community elect their own government officials and recognise their traditional leaders to ensure harmonious coexistence between municipal ordinances and customary laws. This duality is typified by the constitutions of Lekinioch Municipality (in Chuuk) and the state of Yap.

The Lekinioch Constitution empowers *sou eak* (traditional leaders) to ensure imported laws are compatible with local customs. Its Constitution declares:

*Oolap V, Okisen 1 a apasa, ei chulap mi amafila me apechakula eoranei, nonnoon aramas, samolen eoranei me pechakilen soupisek. Tumwunen limaach, osupwangen aramas, are afefeitian tufich epwe ffor pwal itei pwungen alluk. Okisen 2. Soueak a auwennam on tumunen me apechakkulen eoranei.*<sup>32</sup>

the Constitution shall reinforce the traditions of the people, recognise their traditional leaders, and customary ownership of properties. The maintenance of traditional community health and prevention of poverty shall be reinforced by the municipal's ordinances.

Section 2 further states that 'traditional leaders shall be the guardians and reinforcers of traditions'.<sup>33</sup> The Municipality of Namoluk's Constitution similarly reinforces its customs and traditions: 'the people of Namoluk

31 *The Constitution of the Federated States of Micronesia*, Article V, Section 3.

32 *The Constitution of Lekinioch Municipality*, Lekinioch Island, 17 August 1996, Section 1-2.

33 *The Constitution of Lekinioch Municipality*.

... affirm our desire to respect and uphold our traditions and customs, protect and promote our natural heritage and social bonds we have as a people, now and forever'.<sup>34</sup>

Traditions and customs are also constitutionally protected in the neighbouring state of Yap. For example, Article III, Section 1 of that state's Constitution expresses that 'due recognition shall be given to the *Dalip pi Nguchol*<sup>35</sup> and their traditional and customary roles'.<sup>36</sup> Section 2 states:

there shall be a Council of *Pilung*<sup>37</sup> and Council of *Tamol*<sup>38</sup> which shall perform functions which concern tradition and custom. Due recognition shall be given to traditions and customs in providing a system of law, and nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom as articulated by section 3.<sup>39</sup>

The state of Chuuk also ensures that traditions and customs are fully safeguarded in its Constitution. Article IV, Section 1 states:

existing Chuukese custom and tradition shall be respected. The Legislature may prescribe by statute for their protection. If challenged as violative of Article III, protection of Chuukese custom and tradition shall be considered a compelling social purpose warranting such governmental action.<sup>40</sup>

Section 2 states:

nothing in this Constitution takes away the role or function of a traditional leader as recognized by Chuukese custom and tradition, or prevents a traditional leader from being recognized, honoured, and given formal or functional roles in government.<sup>41</sup>

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34 Marshall, *Namoluk beyond the Reef*, p. 6.

35 The *Dalip pi Nguchol* are the paramount chiefs of Yap State. See Donald Rubinstein and Clement Mulalap, 'A Proposed Chinese Mega-Resort in Yap: Vulnerabilities, Opportunities, and Pacific Geopolitics', Paper presented at Micronesian Symposium 'Micronesia in Focus', The Australian National University, Canberra, 28–29 April 2014, p. 9.

36 *Yap State Constitution*, Article III, Section 1, [fsmLaw.org/yap/constitution/index.htm](http://fsmLaw.org/yap/constitution/index.htm).

37 *Pilung* refers to the three pillars of traditional wisdom and power. See Pinsker, 'Traditional Leaders Today in the Federated States of Micronesia'.

38 *Tamol* refers to the traditional chiefs of the outer islands in Yap. In Chuukese, they are called *samol*.

39 *Yap State Constitution*, Article III, Section 2.

40 *Chuuk State Constitution*, Article IV, Section 1, [fsmLaw.org/chuuk/index.htm](http://fsmLaw.org/chuuk/index.htm).

41 *Chuuk State Constitution*, Article IV, Section 2.

Section 3 allows the state legislature to appropriate funds annually for a traditional leaders' conference. Section 4 ensures that 'traditional rights over all reefs, tidelands, and other submerged lands, including their water columns, and successors' rights thereto, are recognized. The Legislature may regulate their reasonable use'.<sup>42</sup>

Article II, Section 1 of the Kosraen State Constitution affirms that:

except when a tradition protected by statute provides to the contrary:

(a) No law may deny or impair freedom of expression, peaceable assembly, association, or petition, and

(b) a person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws.<sup>43</sup>

The Pohnpeian Constitution, Article 5, Section 1, 'upholds, respects, and protects the customs and traditions of the traditional kingdoms of Pohnpei'.<sup>44</sup> Section 2 states:

the Government of Pohnpei shall respect and protect the customs and traditions of Pohnpei. Statutes may be enacted to uphold customs or traditions. If such a statute is challenged as violating the rights guaranteed by this Constitution, it shall be upheld upon proof of the existence and regular practice of the custom or tradition and reasonableness of the means established for its protection, as determined by the Pohnpei Supreme Court.<sup>45</sup>

Section 3 seeks to 'strengthen and retain good family relations in Pohnpei, as needed' by recognising and protecting 'the responsibility and authority of parents over their children. This Constitution also acknowledges the duties and rights of children in regard to respect and good family relations as needed'.<sup>46</sup>

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42 *Chuuk State Constitution*, Article IV, Section 4.

43 *Kosrae State Constitution*, Article II, Section 1, [fsmlaw.org/kosrae/constitution/entire.htm](http://fsmlaw.org/kosrae/constitution/entire.htm).

44 *Pohnpei State Constitution*, Article IV, Section 1, [fsmlaw.org/pohnpei/index.htm](http://fsmlaw.org/pohnpei/index.htm).

45 *Pohnpei State Constitution*, Article IV, Section 2.

46 *Pohnpei State Constitution*, Article IV, Section 3.

## Prelude to the Creation of the Constitution

The FSM's Constitution was negotiated during the ConCon and adopted by Micronesian representatives in the early 1970s. During the negotiation process, each state delegation expressed what needed to be included in the proposed constitution. The essential features were related to the harmonisation of the variety of cultures in the structure of the proposed government. The key question was how should the constitution be framed to accommodate the issues? Recognising their differences, the delegations agreed on traditions and local environmental issues to be left to the state and municipal governments,<sup>47</sup> while foreign relations were delegated to the national government. The Yapese and Pohnpeian delegations wanted their paramount chiefs to have a role at the national level. The delegation from Chuuk disagreed with this idea as the Chuukese have no paramount chief; each village or island in Chuuk has its own *samol*, and it would be hard to nominate a paramount chief from the pool of *samol* to represent Chuuk at the national level. Kosrae had lacked paramount chiefs since Western diseases reduced the population in the nineteenth century. An agreement was reached between the delegations that a chamber of chiefs should be created constitutionally,<sup>48</sup> with the decision on how to select chiefs to represent them at the national level left to each state to decide. To date, the provision relating to the creation of a chamber of chiefs remains dormant as there has been no move to activate it. At the state and municipal levels, however, chiefs continue to play essential roles in protecting cultures and traditions.<sup>49</sup> It is very possible that the ongoing power struggle between the executive and legislative branches of the national government may precipitate the need for the chamber of chiefs to intervene. This suggests that traditional chiefs can assist in shaping the nation's future.<sup>50</sup>

47 For an in-depth discussion, see Meller, *Constitutionalism in Micronesia*, pp. 261–281.

48 *The Constitution of the Federated States of Micronesia*, Article V.

49 *The Constitution of the Federated States of Micronesia*.

50 Political leaders of the FSM need to understand the purpose of traditions as included in the Constitution as an alternative to legal dispute. The Chamber of Chiefs is meant to serve this purpose. See the *Constitution of the Federated States of Micronesia*, Article V, Section 3.

## Connecting the Constitution and Micronesian History

The FSM's Constitution underscores the continuity of Micronesian history and belief in the ongoing value of unity in the face of challenges presented by the modern world. It empowers Micronesians to wear the Micronesian identity as a personal badge of honour as they carry their passports, crisscrossing the globe.<sup>51</sup> The assertion of Micronesia's place in history is noted in the Preamble:

with this Constitution, we affirm our common wish to live together in peace and harmony, to preserve the heritage of the past, and to protect the promise of the future. To make one nation of many islands, we respect the diversity of our cultures. Our differences enrich us. The seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger. Our ancestors, who made their homes on these islands, displaced no other people. We, who remain, wish no other home than this. Having known war, we hope for peace. Having been divided, we wish unity. Having been ruled, we seek freedom. Micronesia began in the days when man explored seas in rafts and canoes. The Micronesian nation is born in an age when men voyage among stars; our world itself is an island. We extend to all nations what we seek from each: peace, friendship, cooperation, and love in our common humanity. With this Constitution we, who have been the wards of other nations, become the proud guardian of our own islands, now and forever.<sup>52</sup>

While it is easy to dismiss these as statements of desire rather than reality, the values espoused above are culturally valued and historically proven pillars of Micronesian identity. They were inserted into the Constitution to help restore Micronesian memories of values suppressed by colonial rule and permanently embed them into the national psyche for the purposes of perpetuating the Micronesian identity and continuity. While framed by colonial boundaries, a deeper reading of Micronesian history and nation

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51 *The Constitution of the Federated States of Micronesia* was constructed based on Micronesian historical experience in response to the changing international circumstances. As the Preamble states, 'to preserve the heritage of (Micronesian) past and to protect the promise of the future ... to make one nation of many islands, we respect the diversity of our cultures. Our differences enrich us'.

52 *The Constitution of the Federated States of Micronesia*, Preamble.

building reveals the FSM was born from Micronesians' own historical consciousness stemming from their deep affinity with each other prior to and after colonialism.<sup>53</sup>

Oral history and linguistic evidence suggests that the configuration of the FSM approximates the pattern of past boundaries.<sup>54</sup> The *sawei* system,<sup>55</sup> which centred on inter-island connections between the volcanic island of Yap and its low-lying islands in the western part of Chuuk, is a reminder of the extensive connection between the central and eastern parts of the FSM. This connection also served as a form of insurance to ensure the survivability of the people who depended on each other in an environment prone to natural disasters such as typhoons, ocean surges and famine. The FSM is located in what is known as typhoon alley. Typhoons or *melimel* (strong storms) frequent these islands every year. They can devastate islands and deprive the islanders of their food supply. Historically, in such instances, the high volcanic islands of Yap and Chuuk would provide assistance to the low-lying islands as their larger land area and high ground meant that they could better withstand typhoon damage. Assistance was distributed through the established *sawei* network, with an associated regular voyage of outer islanders to Yap to acknowledge the latter's parental kin relationship. Yapese hosts benefitted from the prestige of this off-island recognition of their authority, which made them willing to give far more than they received in the material exchanges between low and high islands that took place during outer islanders' stays on Yap.<sup>56</sup>

53 Historian Hanlon argued that Micronesia is a colonial construct and only exists in people's imagination. However, anthropologist Glenn Petersen claims that while this may previously have been so, the people of Micronesia now have a sense of their historical connection as united by the name 'Micronesia'. Thus, this is no longer a figment of imagination and is a reality in the contemporary FSM. See Hanlon, 'Magellan's Chroniclers?', pp. 53–54; Petersen, *Traditional Micronesian Societies*, pp. 12–13.

54 The FSM is part of the Trukic geo-linguistic group prior to the arrival of the colonists. See Rauchholz, 'Notes on Clan Histories and Migration in Micronesia', pp. 54–55.

55 William Alkire, 'Traditional Exchange Systems and Modern Political Developments in the Yap District of Micronesia', in *Persistence and Exchange: Papers from a Symposium on Ecological Problems of the Traditional Societies of the Pacific Region*, edited by Ronald W. Force and Brenda Bishop, August–September, 1979, pp. 16–18; William Lessa, 'Ulithi and the Outer Native World', *American Anthropologists*, Vol. 52, 1950, p. 32; D'Arcy, *The People of the Sea*, pp. 146–147; Hunter-Anderson and Zan, 'Demystifying the Sawei', pp. 4–6. The *sawei* system was a tribute system between the volcanic island of Yap and the low-lying islands to east of it and the northwest Chuuk. It was seen as security insurance for all involved.

56 D'Arcy, *The People of the Sea*, pp. 146–150.

Similar networks are found in the islands of present-day Chuuk and Pohnpei states. In the Mortlocks, for example, the *ainang* system imposes duties and obligations to provide food to its members in the island chain during famine or when a member travels between the islands.<sup>57</sup> Pohnpei's oral history also speaks of a network system between its low-lying islands surrounding the volcanic main island. These network systems are still in existence, but with evolving dimensions as they incorporate new elements of the modern world.<sup>58</sup> Pohnpei and Kosrae were also linked, for example, by the exchange of ideas in the design of their architecture. Kosraean structures have similar designs to Nan Madol in Pohnpei, suggesting cultural links.

## Reconnecting Islands

The sea remains central to Micronesian survival. It serves as the highway for inter-island communication and trade throughout the Micronesian archipelagos.<sup>59</sup> Although modern modes of transportation have replaced sailing canoes, the sea routes remain known to Micronesians today. The modern economy is increasingly focused on marine resources. Micronesians continue to retest their knowledge by retracing their ancestral voyages on sailing canoes and open motorboats using traditional navigation techniques. For example, in June 2013, a traditional *palou* from Poluwat named Soste and his relatives sailed from his island to Guam using traditional methods of navigation.<sup>60</sup> Likewise, Peter Sitan, a traditional *palou* from the Mortlocks, tested his skills on the sea as recently as 2008 using an outboard motor skiff to travel from his island of Ettal in Chuuk to the main island of Pohnpei.<sup>61</sup> Soste's and Sitan's actions served as a reminder of the ongoing links to and value placed on sea navigation by Micronesians. The Constitution's Preamble states

57 Marshall, *Namoluk beyond the Reef*, pp. 39–40; Flinn, *Diplomas and Thatch Houses*, p. 141.

58 My personal knowledge. The descendants of Mortlockese people who migrated to Pohnpei after the 1907 super typhoon that devastated the Mortlock Islands hold some traditional titles bestowed upon them by the traditional chiefs of Pohnpei, especially the chieftom of Sokehs. This is in recognition of their contribution to *tiabk en sapw* (Marshall, *Namoluk beyond the Reef*, pp. 40–42; Goodenough, *Property, Kin, and Community in Truk*, p. 86).

59 D'Arcy, *The People of the Sea*, pp. 144–145; Duane, *Clan and Copra*, pp. 120–123; Marshall, *Namoluk beyond the Reef*, pp. 8–10.

60 Phillip H. Blas, 'Traditional Chuukese Sailing Canoe Reaches Guam: Crew Navigated 500 Miles without Using Modern Technology', *Pacific Islands Report*, 19 June 2013, [www.pireport.org/articles/2013/06/19/traditional-chuukese-sailing-canoe-reaches-guam](http://www.pireport.org/articles/2013/06/19/traditional-chuukese-sailing-canoe-reaches-guam).

61 Peter Sitan, Interview, Pohnpei, 20 January 2011; Blas, 'Traditional Chuukese Sailing Canoe Reaches Guam'.

that Micronesian history ‘began in the days when man explored seas in rafts and canoes. The Micronesian nation is born in an age when men voyage among stars’.<sup>62</sup> This suggests that Micronesians still honour their ancestral ways to perpetuate islanders’ continuity, as demonstrated by the above two navigators. It is worth noting that Sitan is the president of the National Fisheries Corporation and applied his traditional knowledge of the sea to return the FSM’s fishing fleets to profit and sustainability. Micronesians are in touch with their deepest past while simultaneously mastering the modern world.

## The *Ainang* System

The *ainang* system has been central to Micronesian relationships across the horizon. For example, the *kachaw* clan in Chuuk has its origin in Kosrae and Pohnpei.<sup>63</sup> Likewise, some Yapese clans’ origins extend to the islands of Chuuk and vice versa.<sup>64</sup> Today, the indigenous people continue their relationship with each other via the *ainang* network. Linguistic evidence also suggests a shared Micronesian connection through a common language called Chuukic that encompasses the Mortlock Islands in the eastern part of the former Caroline Islands to the western end of the island chain in Palau.<sup>65</sup> This is evidenced by the fact that many of the low-lying islanders in Yap can converse with the people in the western part of Chuuk and the Mortlocks region.<sup>66</sup> Connection between Micronesians through this common language remains strong, and the Constitution has provided opportunities for more interaction.<sup>67</sup> For example, any citizen of the FSM can travel and reside anywhere in the FSM, and most migrate if they have kin connection in a new place.

Since Micronesian people are historically mobile, they naturally continue to transplant themselves further afield. This is made possible by the global transportation system and political links with former colonial powers. Current estimates indicate that under the Compact, more than 20 per cent of the Micronesian population now resides outside the nation,

62 *The Constitution of the Federated States of Micronesia*, Preamble.

63 Uman, Saladier and Chipen, *Uruon Chuuk*, pp. 1–7; Kim, *Into the Deep*, pp. 6–7.

64 Alkire, *Lamotrek Atoll and Inter-Island Socio-Economic Ties*, p. 10.

65 Rauchholz, ‘Notes on Clan Histories and Migration in Micronesia’, pp. 54–55; Kim, *Into the Deep*, pp. 6–7; Alkire, *Lamotrek Atoll*, pp. 28–30.

66 Marck, ‘Micronesian Dialects and the Overnight Voyage’, pp. 253–258.

67 *The Constitution of the Federated States of Micronesia*, Preamble.

particularly in the US.<sup>68</sup> This new diaspora will continue to expand as a result of the globalised world and the inherent urge of the Micronesian people to travel to join their families now searching for opportunities outside Micronesia. It is argued that a consequence of this process is the exportation of Micronesian ideologies to the new spaces in order to facilitate Micronesians' transition to their adopted environment while maintaining a connection to their island homes.<sup>69</sup> The *ainang* system is the glue that links geographically dispersed clan members to each other and their nation state.

Forever mobile throughout their long past, Micronesians are adapting quickly to their new globalised lifestyle. As Captain Marar notes, 'Micronesians are genuinely great navigators; they continue to explore new stars to sail in the new globalised sea of the globalised world to reconnect with their history and new experiences'.<sup>70</sup> Despite the movement of Micronesian people beyond the horizon, the *Shulapan allik* recognises their citizenship. For example, Micronesians living abroad continue to participate in national elections; their votes are sent back to the FSM to be counted. Further, their interests in land over non-citizens are legally protected by the Constitution.<sup>71</sup>

## The Legal System in its Micronesian Context

While reflecting Micronesian history and values, the FSM's Constitution is still derived from an American model. This provides an inherent tension between American and Micronesian jurisprudence.<sup>72</sup> This tension was naturally present from the outset as US judges dominated the court system. Legal precedents were framed in the image of American judicial precedents. For example, lawyer Brian Tamanaha argued that US judges used their knowledge of the US legal system when interpreting Micronesian cases due to their unfamiliarity with Micronesian traditions,

68 SBOC, [www.s boc. fm/](http://www.s boc. fm/) (site discontinued).

69 Marshall, *Namoluk beyond the Reef*, pp. 144–145.

70 David Marar, pers. comm., Nett, Pohnpei, 20 January 2011.

71 *The Constitution of the Federated States of Micronesia*, Article XIII, Section 4.

72 There is often tension between FSM and US interpretations of the law, especially when the issue of culture is involved. Although some cases have been settled, it is debated whether the decisions were conclusive. See *FSM v Mudong*, 1 FSM Intrm. 135 (Pon. 1982); *FSM v Tammed*, 5 FSM Intrm. 426 (Yap 1990).

despite being constitutionally mandated to consider these traditions.<sup>73</sup> However, former Associate Judge Dennis Yamase asserted that this is no longer the case as more Micronesian judges have entered the court system and are shaping it in accordance with Micronesian jurisprudence.<sup>74</sup> The court system has matured legally and is promoting constitutional principles immersed in traditional practices, such as alternative dispute resolutions among communities.<sup>75</sup> However, one still wonders about the validity of Yamase's claim, particularly when most Micronesian judges are educated at institutions that teach American jurisprudence.

It is understood that at the time of the FSM's independence there were no qualified indigenous lawyers certified by competent law schools to organise and develop the legal system and a Micronesian-based jurisprudence. Consequently, US judges were appointed to undertake the task. The judges' landmark decisions essentially reinforced non-Micronesian legal principles, which promoted the interests of the state and the universal rights of a person as an individual. This line of thought and priority contradicted traditional values despite the Constitution's recognition of the importance of cultures and traditions in the courts' decisions.<sup>76</sup> This is still a matter of controversy and the subject of ongoing debate between the black letter approach and the radicals who seek a wider and fuller interpretation of the Constitution, including the application of customary laws. The key legal question is, what constitutes 'the law' from a Micronesian perspective?<sup>77</sup>

Jurisprudential debate has been central to Micronesian independence, identity and continuity. This has raised the issue of whether the FSM's legal system is genuinely constructed by local values or whether the system has been utilised by outsiders to reimpose their values under a different guise.<sup>78</sup> Is the lack of understanding of Micronesian cultures an appropriate defence on the part of foreign judges when rendering decisions contrary to indigenous cultures?<sup>79</sup> Foreign judges presiding over FSM courts immediately after the implementation of the Constitution have been

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73 Puas, 'The FSM Legal System'.

74 Yamase, *The Supreme Court of the Federated States of Micronesia*, pp. 36–38.

75 Yamase, *The Supreme Court of the Federated States of Micronesia*, pp. 36–38.

76 Puas, 'The FSM Legal System', pp. 11–12.

77 No one has raised the issue and it needs to be addressed. See Puas, 'The FSM Legal System', pp. 11–12.

78 Puas, 'The FSM Legal System', pp. 11–12.

79 Puas, 'The FSM Legal System', pp. 11–12.

regarded as the main architects of FSM's jurisprudence. The established precedents and their rulings have provoked debate between two opposing camps within the FSM legal fraternity.<sup>80</sup> One view is that the decisions of the foreign judges have been admired and recognised as developing the legal landscape in the fledgling nation. This is because their decisions were seen as endorsing black letter law and the primacy of the individual in any contest involving customary law.<sup>81</sup> This perspective has been supported for providing certainty by not having to determine customary issues in key cases and leaving behind a solid legal system. The alternative view is that the US judges left behind a half-baked legal system almost devoid of Micronesian perspective or input.<sup>82</sup> This is evident from their narrow interpretation of the Constitution from the outset, which arguably put the legal system on an inappropriate footing for developing an independent and locally responsive legal system.

## Values and Identity in the Legal System

Micronesian criticism of the narrow interpretation of the Constitution in decisions made by US judges can be seen in cases such as *FSM v Mudong* (Pon. 1982),<sup>83</sup> *FSM v Alaphonso* (Truk 1982),<sup>84</sup> *Semens v Continental* (Pon. 1986)<sup>85</sup> and *FSM v Tammed* (Yap 1990).<sup>86</sup> The courts' decisions in these cases and subsequent similar cases constituted a systematic promotion of American social values at the expense of Micronesian cultural values. The decisions effectively moulded the FSM legal system in the image of American jurisprudence, rather than developing a Micronesian legal system based on the goals articulated during the ConCon.<sup>87</sup> The basis of

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80 My personal observation as a trained lawyer who has frequently worked with lawyers within the FSM over the last 11 years. There has been ongoing debate about legal precedents left by foreigners that are still followed by Micronesian judges. Micronesian legal scholars have not extensively written on this subject.

81 My personal observation.

82 Brian Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law*, Studies in Humanities (series), Center of Non-Western Societies, Leiden University, The Netherlands, 1993, pp. 59–67; Discussions with colleagues at the FSM Supreme Court, Palikir, Pohnpei, January 2010 during contractual employment at the Congress of the FSM.

83 *FSM v Mudong*.

84 *FSM v Alaphonso* (Truk 1982), [fsmlaw.org/fsm/decisions/index.htm](http://fsmlaw.org/fsm/decisions/index.htm).

85 *Semens v Continental*, 2 FSM Intrm. 200 (Pon. 1986), [fsmlaw.org/fsm/decisions/index.htm](http://fsmlaw.org/fsm/decisions/index.htm).

86 *FSM v Tammed*, 5 FSM Intrm. 426 (Yap 1990).

87 Meller, *Constitutionalism in Micronesia*, pp. 340–341.

this harsh assessment is that, constitutionally, court decisions must first look at *eoranian fanou* in the FSM.<sup>88</sup> In the case of *Etpison v Perman* (Pon. 1984), for example, it was stated by the court that:

the FSM Supreme Court may look to decisions under the United States Constitution for guidance in determining the scope of jurisdiction since the jurisdictional language of the FSM Constitution is similar to that of the United States.<sup>89</sup>

*In re Sproat* (Pon. 1985), again the court said, ‘the jurisdictional language in the FSM Constitution is patterned upon the United States Constitution’<sup>90</sup> and the implementation of US legal concepts. In *FSM v Alophonso*, the court reasoned:

most concepts and many actual words and phrases in the FSM Constitution [as in] ... the Declaration of Rights came directly from the [US] Constitution ... Bill of Rights. In the two Constitutions, the language ... is nearly identical.<sup>91</sup>

Therefore, it was only logical that the court establish a precedent based on the import of American laws.<sup>92</sup>

A comparison of the US and FSM constitutions reveals obvious differences. They have a different history, textual language, structure and underlying philosophy.<sup>93</sup> Even if the Micronesian Constitution was patterned on the US Constitution, it does not necessarily follow that a court must transplant US precedents to decide cases arising in a Micronesian context. The court could have made a greater effort to accommodate Micronesian *eoranien fanou* by seeking the advice of scholars or Micronesians knowledgeable in the matters before the court.

Conflict between a narrow interpretation of the law and *eoranian fanou* was initially tested in the cases noted above. Because the courts lacked the depth of knowledge in relation to *eoranien fanou*, they inadvertently derailed the development of a fully-fledged Micronesian jurisprudence.

88 *The Constitution of the Federated States of Micronesia*, Article XI, Section 11.

89 *Etpison v Berman*, 1 FSM Intrm. 405 (Pon. 1984), [fsmlaw.org/fsm/decisions/index.htm](http://fsmlaw.org/fsm/decisions/index.htm).

90 *In re Sproat*, 2 FSM Intrm. 1 (Pon. 1985), [fsmlaw.org/fsm/decisions/index.htm](http://fsmlaw.org/fsm/decisions/index.htm).

91 *Alaphanso v FSM*, 1 FSM Intrm. 209 (App. 1982), 209, [fsmlaw.org/fsm/decisions/index.htm](http://fsmlaw.org/fsm/decisions/index.htm).

92 *Alaphanso v FSM*.

93 It seems that Edward C. King contradicted himself when discussing the differences between the *Constitution of the Federated States of Micronesia* and the US Constitution. Yet he preferred to follow the US approach in deciding the law. For further discussion, see King, ‘Custom and Constitutionalism in the Federated States of Micronesia’, pp. 2–3; Puas, ‘The FSM Legal System’, p. 13.

This could be considered a revival of the colonial years when black letter law was perceived as superior to customary law.<sup>94</sup> This argument treats the two judges as facilitators of an American 'judicial activism' that further diluted Micronesian customs and traditions for the purpose of maintaining American interests in the FSM.<sup>95</sup> Micronesia requires judicial decisions that seriously consider customary law and deliver inclusive, holistic and harmonious judgments to Micronesian communities. It is not accepted that customary law operates 'outside' the constitutional legal system. In fact, many municipal-level courts ignore the formal legal system and use traditional methods of settling disputes.

The case of *FSM v Mudong* highlighted the conflict that could arise when interpreting the Constitution from an individual rights perspective in a case enmeshed in customary and traditional issues. In that case, the two appellants asked the court to dismiss the case as the issues had been resolved through *tiaken Pohnpei*, a Pohnpeian customary apology.<sup>96</sup> The court denied the defendants' motion, citing 'prosecutorial discretion' and referring to custom as insufficient grounds on which to call a halt to and dismissal of criminal proceedings.<sup>97</sup> The court indicated that:

the customary effect upon court proceedings of a customary forgiveness is not self-evident, and the defendants offered no evidence to establish that dismissal of a court proceeding is one of customary [law].<sup>98</sup>

However, it should have been self-evident to the court that it would be impossible to find precedents that could establish that the dismissal of court proceedings was available under customary law given that there was no court system in customary law.<sup>99</sup>

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94 The law provides mechanisms for judges to use expert witness when customary practises are involved. Justice King ignored such an avenue. See *National Judiciary Act, Public Law No. 1-31* (FSM).

95 Puas, 'The FSM Legal System', pp. 21–22.

96 Customary apology in Pohnpei involves bringing together the families of the opposing parties over *sakau* and making apologetic speeches evoking traditional connections. See the case of *FSM v Mudong*.

97 It is often a risk when prosecution discretion is exercised by outsiders as they lack the depth of knowledge of Micronesian customs. Today, it is a policy to hire Micronesians first. Foreigners may be hired if a position cannot be filled by indigenous professionals.

98 *FSM v Mudong*.

99 *Amicus curiae* (lit. 'friend of the Court') refers to experienced, retired lawyers familiar with the court system and the law who may be called on by the court to offer expert advice on issues before the court. See *National Judiciary Act, Public Law No. 1-31* (FSM).

In support of the prosecutorial discretion argument, the court reasoned that ‘the National Criminal Code does not grant the prosecutor authority to dismiss an existing prosecution on the basis of customary law’.<sup>100</sup> The court further reasoned, *inter alia*, that customary law and the Constitution perform different functions.<sup>101</sup>

The court could have considered the alternative, that ‘those customs that have the status of customary law are a source of law and should be recognised by the Court as such, without evidence having to be adduced’.<sup>102</sup> That is, evidence of Pohnpeian practice should have been sufficient without the appellants requiring ‘expert’ evidence from a foreign anthropologist. Pohnpeian custom should have been self-evident as it is uniform practice on the main island. Perhaps the court could have called upon its *amicus curiae*<sup>103</sup> to assist it in establishing the proper interpretation and thus application of Pohnpeian traditions. Moreover, an assessor could have been appointed by the court as subject to the National Judiciary Act, Public Law No. 1-31. As Section 12 of that Act states, the court is authorised:

to appoint assessors to advise about local law or custom ... any Justice of the Supreme Court may appoint one or more assessors to advise him at the trial of any case with respect to local law or custom or such other matters requiring specialised knowledge. All such advice shall be of record and the assessors shall be subject to examination and cross-examination by any party.<sup>104</sup>

This misinterpretation of the FSM’s Constitution by US judges may be considered as undermining the development of the FSM justice system, arguably weakening the FSM’s unique cultural identity. In doing so, precedents were set that differentiated the law from custom, with the view that it would be easier for subsequent judges to concentrate on a precedent-based system. However, this has made it difficult for subsequent Micronesian judges to reset the system to include both the law and custom.

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100 *FSM v Mudong*.

101 It is undoubtedly true that the US Constitution differs from the *Constitution of the Federated States of Micronesia* as they have had different roles based on the different histories of their respective countries. The *Constitution of the Federated States of Micronesia* values customs as part of the judicial process, especially when issues of the social configuration principle are involved. The issues could be generally settled if the court looks at *The National Judiciary Act, Public Law No. 1-31* (FSM).

102 Tess N. Cain, ‘Convergence, or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Islands Region’, *Melbourne Journal of International Law*, Vol. 2, 2001, p. 51.

103 See the principle of *amicus curiae* in fn. 99.

104 *FSM v Mudong*.

There is still a significant tension between custom and the court system within the FSM. It can be argued that the Constitution should not control but recognise custom as it plays an important role in disputes, violence, or wrongdoing in the Pohnpeian community.<sup>105</sup> Many independent Pacific Island nations' constitutions and legal systems effectively recognise customary law within their procedures.<sup>106</sup> The FSM's Constitution can and should recognise customary means of dispute resolution within criminal proceedings. However, per established legal precedent:

[Micronesian custom and] the constitutional legal system established by the people of the FSM, flow from differing premises and traditions. They serve different purposes ... Customary law de-emphasises notions of individual guilt, rights and responsibility, and places greater stress on the groups to which the individual accused and victims belong. The Constitutional ... system concentrates upon smaller and larger units than those immediate groups emphasised by customary law.<sup>107</sup>

Yet, the Constitution provides the solution to this tension between custom and court legal procedures. The root of the problem lies in the interpretation of the Constitution within the court system, rather than in the Constitution itself. The Constitution does not set up dual independent systems of law as suggested in the above court cases; indeed, to the contrary, the Constitution intended the courts to take customs and traditions into account in all decisions, as set out in Article XI, Section 11. These words should be accorded this recognition during the court process and not diluted so as to promote individual rights in all contexts.<sup>108</sup> As sociologists Maclver and Page comment:

customs support the law and without such it becomes meaningless. Custom establishes social order of its own so that conflict arising between custom and the law is not a conflict between law and lawlessness, but between the orders of reflection [customs] and the order of spontaneity [law]. In general, customs regulate the

105 *The Constitution of the Federated States of Micronesia* specifically indicates that judges should be mindful in their decisions when customary matters are involved. See *The Constitution of the Federated States of Micronesia*, Article XI, Section 11; *Etscheit v Santos*, 5 FSM Intrm 35.38 (App. 1991); *Rosie v Healy-Tibbets Builders, Inc*, 5 FSM Intrm. 358, 361 (Kos. 1992).

106 Lamour, *Foreign Flowers*, pp. 15–17.

107 *FSM v Mudong*.

108 Daniel P. Ryan, *Essential Principles of Contract and Sales in the Northern Pacific: Federated States of Micronesia, the Republics of Palau and the Marshall Islands and US Territories*, iUniverse, USA, 2009, p. xxiii.

whole social life of man. Law itself cannot cover the whole gamut of social behaviour. It is the customary practices that contribute to the harmonious social interactions in a society.<sup>109</sup>

This combination of law and custom working in tandem towards the same objective of consensus-based social harmony is essential in the Micronesian context.

It is clear that the US judges meant to elevate the status of individual rights over those of the group and justified this position by claiming that the rights of ‘immediate groups’ fall within the purview of customary concern. This reasoning does not reflect the reality of life in the FSM. As noted earlier, Micronesians belong to an extended *ainang* diaspora dispersed throughout the islands. They are not divided into isolated clans that can be left alone to perform their own customary duties.<sup>110</sup> Customary law is part of the Constitution and should have been considered holistically by the courts as a valid means of resolving disputes and bringing peace back into the community—surely the ultimate intention of the Constitution.<sup>111</sup>

Familial relations are equally as important as *ainang* relationships within Micronesian custom. It is undoubtedly true that familial relationships are at the very core of Micronesian society and are the source of numerous rights and obligations that influence practically every aspect of the lives of individual Micronesians. These relationships are an important component, perhaps the most important component, of the custom and tradition referred to generally in the Constitution (Article V) and specifically in the National Criminal Code, which states, ‘this Court has no desire to disregard or minimise the importance of such relationships’.<sup>112</sup>

In *FSM v Tammed*, the court noted:

the duty of a national court justice [is] to give full and careful consideration to a request to consider a particular customary practice or value in arriving at a decision requires careful investigation of the nature and customary effect of the specific practice at issue, a serious effort to reconcile the custom and tradition with other

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109 Robert Maclver and Charles Page, ‘Custom’, *Sociology Guide*, [sociologyguide.com/basic-concepts/Custom.php](http://sociologyguide.com/basic-concepts/Custom.php).

110 The extended *ainang* family.

111 See *The Constitution of the Federated States of Micronesia*, Article XI, Section XI.

112 *FSM v Tammed*.

constitutional requirements, and an individualised decision as to whether the specific custom or tradition should be given effect in the particular contexts of the case before the court.<sup>113</sup>

Further complicating the issues of custom, the court stated that ‘the party asserting customary law has the burden of proving by a preponderance of the evidence the existence, applicability and customary effect of such customary law’.<sup>114</sup> The key issue at stake here is who should be recognised as having the authority to provide that evidence to the court to ensure that Micronesian values are not eroded.

## Conflict between the FSM's Constitution and State Traditions

In 1990, a consolidated appeal case went before the court as a test case between the primacy of the Constitution and state traditions. The case was *FSM v Tammed*, where two separate appellants were charged with rape. However, before they were arrested or charged, they were caught and beaten by the relatives of the victims, with both sustaining serious injuries and one requiring hospitalisation. Both defendants were convicted of the charges but disagreed with the sentencing and appealed.

Both appellants argued that the ‘trial court erred in not giving mitigating effect to the beatings each had received when it handed down their respective sentences’.<sup>115</sup> The Appellate Court faced the dilemma as to whether the customary beatings could be considered as mitigating factors in sentencing. The chief justice reasoned:

the record reflects no serious effort by any party in either case to establish the precise contours of customary punishments. There are contentions that some aspects of the beatings were violative of customary procedures, there seems to be general agreement that these beatings have ‘substantial customary’ and traditional implications.<sup>116</sup>

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113 *FSM v Tammed*.

114 Ankush Sharma, ‘Customary Law and Received Law in the Federated States of Micronesia’, *Journal of South Pacific Law*, Vol. 10, Issue 1, 2006, [www.paclii.org/journals/fjSPL/vol10/7.shtml](http://www.paclii.org/journals/fjSPL/vol10/7.shtml).

115 *FSM v Tammed*.

116 *FSM v Tammed*.

This ruling came in the face of pre-sentence reports for one appellant, whose relatives accepted that the beatings were derived from customary practices. The government's counsel suggested:

as a matter of customary law, the beating may have restored the defendants fully to the community, not only reducing or obviating the need for further punishment, but entirely cleansing him of liability ... because of the customary nature of the punishment, then no prosecution was ever initiated against any of those who attacked either of the defendants.<sup>117</sup>

However, the court had to draw a line between custom and the law in order to render its decision. The dilemma was to balance the customary practice of the beating of a wrongdoer against the constitutional right of an individual not to be assaulted.<sup>118</sup> The court did not want to encourage violence against the individual. Yet, if the court condemned beatings as merely a customary practice devoid of legal standing, this would devalue customary law and thus deny the rights of families under customary law as raised in the *Mudong* case. The court issued a decision that the beatings had some mitigating effect but without having any regard to their customary implications or their compatibility with the criminal law or civil rights.<sup>119</sup>

It can be argued that the court in *FSM v Tammed* made its decisions on the basis that the state and the individual have greater rights than traditional interests. Further argument suggested that perhaps some consideration with respect to international law could have been explored to moderate the American perspective of the law by way of balancing it with certain articles in the *International Covenant on Economic, Social and Cultural Rights*, the *Universal Declaration of Human Rights* and other relevant international instruments.<sup>120</sup> There have been decisions in other jurisdictions where judges have drawn on international instruments to resolve problems in domestic jurisdictions. In the alternative, judicial decisions about customary law could have been sought from other Pacific

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117 *FSM v Tammed*.

118 Sharma, 'Customary Law and Received Law in the Federated States of Micronesia'.

119 Many traditionalists argued that cultural beating is compatible with the Constitution in view of Article V, Section 2.

120 *Semens v Continental*.

jurisdictions such as Vanuatu, Samoa or Tuvalu,<sup>121</sup> as discussed in *Semens v Continental*. In this case, Justice King acknowledged the possibility 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'.<sup>122</sup> However, Justice King applied American precedents and did not consider other Pacific Island states.<sup>123</sup>

Some indigenous lawyers have rejected the above analysis by the court in *Mudong* on the basis that the Constitution has highlighted the importance of custom in the justice system, as reflected in Articles V and XI. The notion that customs and the Constitution flow from 'differing premises' is to narrowly interpret the Constitution if the effect is to ignore customs, except in cases where the court thinks it applies to 'those immediate groups emphasised by customary law'.<sup>124</sup> The distinction between custom and individual rights is not made explicit in the Constitution as the intent was that they both be considered in decision-making (judicial and otherwise).

In addition, the concept of the individual in many Micronesian customs is hard to determine as the individual is considered inseparable from their *ainang* group.<sup>125</sup> The decision that the rights of an individual are paramount when compared to an *ainang* group, as held by the court, contributed to the devaluing of Micronesian custom by removing the rights of the extended families to settle their own disputes, a central tenet of traditional community justice. Such a practice could alienate the individual, with devastating consequences for both the family and community at large. In this regard, it should be noted that the FSM has

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121 *Semens v Continental*. Justice King said to look at the South Pacific to borrow precedents of common law but then drew on US law instead. It was a contradiction that demonstrated the inconsistencies in the law as handled by outsiders.

122 For example, *sakau* is a ceremonial drink in Pohnpei, used during community gatherings like funerals, feasts or customary apology. It is made from the root of the pepper tree (*Piper methysticum*).

123 *FSM v Mudong*. The prosecutor lacked knowledge of custom and so to deny Mudong's request to drop the case meant that Pohnpeian custom was secondary to the law in view of the outsider.

124 During my contract work as a lawyer at the FSM Congress and Department of Justice in 2005 and 2010, I discussed the matters with the Micronesian lawyers in government.

125 Individuals are part of the *ainang* system and there is no private individual in many parts of the FSM. One person's problem becomes the affair of the whole extended family in land disputes and death. Perhaps the court could have adopted the doctrine of 'circle sentencing' (restorative justice). This is prominent in many Australian jurisdictions involving Australian Aboriginals, where the court can determine the question of law but Aboriginal Elders decide on the sentencing of the individual offender.

one of the highest suicide rates by *amwinimwin*.<sup>126</sup> Traditional remedies play a crucial role in the maintenance of *eoranian fanou*, the foundation of local identity and continuity.

Tamanaha and his supporters have accused the court of Americanising the judicial system through what many call ‘creative legalism’;<sup>127</sup> that is, judges give lip service to custom and ignore other jurisdictions in the Pacific whose treatment of custom in their legal system could provide a model, instead preferring to cherry pick US cases. This is not an entirely unreasonable stance, given that the judges are more familiar with US law. This has raised questions as to the capacity of foreign judges to be involved in matters concerning customs and the law. For example, Tamanaha has argued that Congress should consider introducing legislation requiring all foreign judges and lawyers to undertake workshops in Micronesian customs and traditions.<sup>128</sup> This would increase their capacity to deal with the difficult issues concerning customs and the law to safeguard the continuation of Micronesian values.

## The Law as a Reinforcer of Identity

Brian Tamanaha, a US lawyer who worked in Yap and later wrote a book about his experiences titled *Understanding Law in Micronesia*, is a critic of the primacy afforded to American jurisprudence and case law in matters before FSM courts. He has criticised Justice King for his selective approach in favouring American legalism, which had no direct connection to the laws and values of Micronesia.<sup>129</sup> Tamanaha has argued that outsiders created their own brand of what the law ‘ought to be’ rather than what ‘the law is’, particularly from a Micronesian perspective.<sup>130</sup> He further argued that the suggestion by Justice King that Micronesians knew what they were in for when ratifying the Constitution as a basis for strengthening his own analysis (e.g. in *FSM v Alophonso*) was not a defence to the criticism of King’s decisions. Tamanaha asserts that even though a high percentage of the population ratified the Constitution, this

126 *Amwinimwin* is a form of psychological punishment imposed on parents and close relatives who, in the eyes of the victim, wrongly punished him or her. See Francis X. Hezel, ‘Cultural Patterns in Trukese Suicide’, *Ethnology*, Vol. 23, July 1984, pp. 193–206, [www.micsem.org/pubs/articles/suicide/frames/cultpatfr.htm](http://www.micsem.org/pubs/articles/suicide/frames/cultpatfr.htm). I use a different spelling of the term.

127 Tamanaha, *Understanding Law in Micronesia*, pp. 59–67.

128 Tamanaha, *Understanding Law in Micronesia*, pp. 59–67.

129 Tamanaha, *Understanding Law in Micronesia*, pp. 59–67.

130 Tamanaha, *Understanding Law in Micronesia*, pp. 59–67.

does not mean that the voters understood the constitutional text in its entirety.<sup>131</sup> Tamanaha is not alone in his view. This is a part of the ongoing debate between the opposing factions within the FSM legal profession as to whether a Micronesian perspective of the legal system has been fully represented by outsiders. Many indigenous lawyers have since entered the legal profession and brought with them different perspectives to the debate. Many have questioned both Tamanaha's and King's perception of Micronesian law and traditions as both are outsiders.

## Conclusion

The administration of the Constitution as discussed in the above cases has been a challenge to Micronesians. This is especially so because the law itself cannot be purely based on imported legal concepts but must fit local customs to sustain continuity. Since coming into contact with the outside world, Micronesian customs and traditions have adapted and maintained their integrity in the globalised world. The management and administration of the law are the responsibility of each state and municipal jurisdiction, in conformity with the national Constitution. At the municipal level, methods of settling disputes continue to be largely led by the heads of the extended family or traditional village leaders of each clan in conjunction with the court system. The FSM honours its Constitution and the culture it safeguards. Like any newly independent nation, the FSM faces tension between its traditions and imported laws. This can be seen in the cases outlined earlier, where US judges implemented precedents that often contradicted local understandings of effective ways of adjudicating and resolving disputes.

The judges' lack of understanding of Micronesian custom and cultures should not be used as a defence of their judgments. The Constitution is clear on the issue of customs and traditions having primacy in judges' decisions. Additionally, there were mechanisms available for the judges to seek assistance on cultural issues. These avenues were ignored. This resulted in legal precedents that continue to promote outsiders' influence in Micronesia. However, Micronesian judges are entering the constitutional system to restrengthen constitutionally defined Micronesian jurisprudence based on historical experience to ensure the indigenous continuation of the Micronesian identity.

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131 Tamanaha, *Understanding Law in Micronesia*, pp. 59–67.

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