COMMENTS

THE AMERICAN LEGAL SYSTEM AND MICRONESIAN CUSTOMARY LAW: THE LEGAL LEGACY OF THE UNITED STATES TO THE NEW NATIONS OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS

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The United States may be on the threshold of terminating a United Nations "strategic" trusteeship[1] under which it has administered a vast number of Pacific island communities since World War II. Many aspects of the administration of the Trust Territory of the Pacific Islands (TTPI) have been critically scrutinized. The United States has been charged with economic neglect[2] and maintaining an "anthropologic zoo"[3] in the period before the early 1960's. The rapidly rising level of appropriations since 1962 combined with United States education policies have created societies economically dependent on the United States,[4] ostensibly to keep the islands firmly within the United States political orbit.[5] The introduction of

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1. Trusteeship Agreement for the Former Japanese Mandated Islands, United Nations Security Council – United States of America, April 2, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter cited as Trusteeship Agreement].

2. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L. FORUM 181 (1971); DeSmith, *Micronesia: In Trust*, 1 MICRONESIAN PERSP., Nov. 1977, at 7; *see also* DEP'T STATE, ANNUAL REPORT TO THE UNITED NATIONS ON THE TRUST TERRITORY OF THE PACIFIC ISLANDS 155 (1966) [hereinafter cited, with respect to different years, as ANN. REPORT 19xx].

3. *See* Kiste, *Overview of U.S. Policy*, in HISTORY OF THE U.S. TRUST TERRITORY OF THE PACIFIC ISLANDS 1–4 (K. Knudsen ed. 1985) [hereinafter cited as Kiste].

4. D. NEVIN, THE AMERICAN TOUCH IN MICRONESIA (1977) [hereinafter cited as Nevin].

5. *See* D. MCHENRY, MICRONESIA: TRUST BETRAYED (1975) [hereinafter cited

a political structure based on the American system has also been criticized as undermining the traditional leadership and creating a "new elite" more closely aligned with United States interests.[6] The foreseeable emergence of four new international entities[7] from Micronesia[8] provides an opportunity to review the impact and performance of the legal system introduced by the United States, an integral element of its administration that has received little attention to date. This note examines the legal systems that have evolved under United States tutelage in Micronesia and, more particularly, the interplay between Micronesian customs and customary law and an American legal system and jurisprudential concepts.

I. BACKGROUND

The United States is the fourth foreign power to exert dominion over Micronesia.[9] Spain held ascendancy, not entirely unchallenged from the 1500's until 1900. Spanish influence was greatest in

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as MCHENRY]. It has been suggested that the United states has implemented the program contained in the infamous Solomon Report, which concluded in the early 1960's that permanent affiliation of Micronesia with the United States was necessary for strategic reasons, and recommended a massive capital investment program followed by an early plebiscite on the issue of affiliation. *See* Friends of Micronesia, The Solomon Report: America's Ruthless Blueprint for the Assimilation of Micronesia (1968). While this theory undoubtably has some attraction for critics of the United States, it is contradicted by the facts, especially the timing of events in Micronesia. Kiste, *supra* note 3; *see also* Gale, *Micronesia, U.S.A.*, 1 MICRONESIAN PERSP., Dec. 1977, at 11.

6. McKnight, *Rigid Models and Ridiculous Boundaries: Political Practice and Development in Palau, circa 1955-1964*, in POLITICAL DEVELOPMENT IN MICRONESIA 47, 52-53 (D. Hughes & S. Lingenfelter eds. 1974); Lingenfelter, *Administrative Officials, Peace Corps Lawyers, and Directed Change on Yap*, in POLITICAL DEVELOPMENT IN MICRONESIA 61 (D. Hughes & S. Lingenfelter eds. 1974) [hereinafter cited as Lingenfelter]; Hughes, *Obstacles to the Intergration of the District Legislature into Ponapean Society*, in POLITICAL DEVELOPMENT IN MICRONESIA 97 (D. Hughes & S. Lingenfelter eds. 1974); Meller, *Micronesian Political Change in Perspective*, in POLITICAL DEVELOPMENT IN MICRONESIA 268, 270 (D. Hughes & S. Lingenfelter eds. 1974) [hereinafter cited as Meller].

7. The four entities are the Commonwealth of the Norther Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau (sometimes spelled "Belau").

8. The terms "Micronesia" and "Trust Territory of the Pacific Islands" are used interchangeably. Technically, Micronesia includes the Gilbert Islands and the islands of Nauru and Guam as well as the three island chains of the TTPI (Mariana, Marshall, and Caroline Islands). MCHENRY, *supra* note 5, at 6.

9. MCHENRY, *supra* note 5, at 5. In a technical sense, the two most recent powers, Japan and the United States, did not "exercise dominion" over Micronesia because they administered the islands under the supervision of international organizations rather than claiming sovereignty over the islands. However, by the end of the 1930's, Japan had violated the terms of its League of Nations Mandate and virtually enslaved the people. The United States, while not claiming sovereignty over the islands, has treated them like a United States territory and has been characterized as a "colonial" master of Micronesia by Micronesians and non-Micronesians. *See* Uludong, *Whither Micronesia?*, in POLITICAL MODERNIZATION OF MICRONESIA (1969); *see also* THE UNITED STATES AND JAPAN IN THE WESTERN PACIFIC: MICRONESIA AND PAPUA

the Mariana Islands. The Caroline and Marshall Islands remained essentially independent until 1874.[10] During its long tenure in the Mariana Islands, Spain did away with traditional landholding systems of the native Charmorros and instituted private legal ownership.

Germany annexed the Marshall Islands in 1888[11] and purchased the Caroline and Mariana Islands from Spain following the Spanish-American War.[12] Germany held the islands until 1914 when Japan seized them at the outbreak of World War I.[13] After the war, Japan held the islands under a League of Nations Class "C" Mandate[14] until World War II. Japan divided the island groups into the six administrative districts of Saipan, Palau, Yap, Truk, Ponape, and Jaluit,[15] and established a judiciary that included a High Court at Palau and three local courts at Palau, Saipan, and Ponape.[16]

The United States took the islands by military force during World War II. In 1947, the United States and the Security Council of the United Nations executed an agreement whereby the United States would administer Micronesia as a strategic trusteeship pursuant to Article 82 of the United Nations Charter.[17] The United States Navy, having maintained possession of the islands since the war, continued to administer the entire TTPI until 1951 when the Department of Interior assumed administrative control.[18] In 1952, the Marianas, except Rota Islands, were returned to Naval administration[19] until 1962, when the Department of Interior resumed authority over the entire TTPI.[20]

The movement toward termination of the trust was initiated by the Congress of Micronesia, a territory-wide legislative body of elected Micronesian representatives, which began negotiations on

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NEW GUINEA 63 (G. Goodman & F. Moos eds. 1981) [hereinafter cited as Goodman & Moos].

10. COCKRUM, THE EMERGENCE OF MODERN MICRONESIA 35, 56 (1970) [hereinafter cited as Cockrum].

11. *Id.* at 57.

12. *Id.* at 64.

13. *Id.* at 74-75.

14. Mandate for the Former German Possessions in the Pacific Ocean Lying North of the Equator, 2 LEAGUE OF NATIONS O.J. 84, 87-88 (1921), *reprinted in* 42 Stat. 2149 (1922); 12 L.N.T.S. 202 (1922).

15. COCKRUM, *supra* note 10, at 80.

16. *Id.* at 81.

17. Trusteeship Agreement, *supra* note 1, arts. 1-2.

18. Exec. Order No. 10,265, 3 C.F.R. 766 (1951); *see* COCKRUM, *supra* note 10, at 432.

19. Exec. Order No. 10,408, 3 C.F.R. 906 (1952); *see* COCKRUM, *supra* note 10, at 443.

20. Exec. Order No. 11,021, 3 C.F.R. 600 (1962), *reprinted in* 48 U.S.C. § 1681 at 745-746 (1982); *see* COCKRUM, supra note 10 at 463-64.

the future political status of Micronesia with representatives of the executive branch of the United States government in 1969.[21] The negotiations culminated in the execution of the Covenant to Establish a Commonwealth of the Northern Mariana Islands,[22] and the Compact of Free Association,[23] which pertains to the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

The process for approval and acceptance of the Covenant has been completed and, upon termination of the Trusteeship Agreement, the Northern Mariana Islands will become a United States Commonwealth, similar in status to Puerto Rico.[24] The Covenant was negotiated and signed by representatives of the Marianas and the United States Government in 1975.[25] It was unanimously approved by the Marianas District Legislature, and overwhelmingly endorsed by the voters of the Marianas in a United Nations observed plebiscite.[26] Thereafter, the Covenant was approved by the United States Congress and signed into law by the President on March 24, 1976.[27]

II. CURRENT STATUS OF THE COMPACT

The Congress of Micronesia's Joint Committee on Future Status had originally negotiated on behalf of all six districts of the TTPI: the Marianas, Marshalls, Palau, Yap, Truk, and Ponape (Kosrae was a part of Ponape and became a separate district in 1977). In 1972, the Marianas District Legislature created the Marianas Status Commission to conduct separate negotiations culminating with the execution of the Covenant.

The United States sought to encourage the concept of a unified Micronesia,[28] and initially rejected requests by Palau and the Marshall Islands for separate negotiations.[29] In 1977, the United States

21. ANN. REPORT 1970, *supra* note 2, at 7.

22. Covenant to the Establish the Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976), *reprinted at* 48 U.S.C. § 1681 [hereinafter cited as the Covenant].

23. Compact of Free Association, Oct. 1, 1982, United States-Federated States of Micronesia, June 25, 1983, United States-Republic of the Marshall Islands, *reprinted at* H.R. REP. NO. 188, 99th Cong., 1st Sess. 78-116 [hereinafter cited as the Compact or the Compact of Free Association]; *see also* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (enabling act for implementation of the Compact of Free Association with respect to the Federated States of Micronesia and the Republic of the Marshall Islands).

24. Clark, *Self-Determination and Free Association – Should the United Nations Terminate The Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 75-78 (1980).

25. ANN. REPORT 1975, *supra* note 2, at 114.

26. *Id.*

27. ANN. REPORT 1976, *supra* note 2, at 7, 20.

28. ANN. REPORT 1972, *supra* note 2, at 19.

29. ANN. REPORT 1976, *supra* note 2, at 22.

Representatives began discussion in a two-tier approach[30] with the Marshall Islands Political Status Commission, the Palau Political Status Commission, and the Congress of Micronesia's Commission on Future Political Status and Transition.[31] The possibility of a unified Micronesia, already seriously undermined by the separation of the Marianas, was finished by the results of the referendum held in July, 1978, on the draft Constitution of the Federated States of Micronesia, which had been created in 1975 in the Micronesian Constitutional Convention.[32] By rejecting the FSM Constitution, voters in Palau and the Marshall Islands rejected the concept of Micronesian unity it embodied.[33] Thereafter, Palau and the Marshall Islands each drafted their own constitutions, which their respective voters approved in referendums in 1979.[34]

Following a series of multilateral and bilateral negotiations, the Compact of Free Association was initialed in 1980 by all four negotiating parties. The Reagan administration reviewed and renegotiated the Compact, and by June 25, 1983 the revised Compact of Free Association, together with the subsidiary agreements, had been signed by representatives of the four governments.[35] The voters in the Federated States of Micronesia (FSM), the Republic of Palau, and the Republic of the Marshall Islands (the RepMar) approved the Compact in separate plebiscites during 1983.[36] Thereafter, the legislators in the FSM and the RepMar ratified the Compact.[37]

The complete termination of the Trusteeship Agreement continues to be postponed by a provision in the Palau Constitution[38] relating to nuclear weapons.[39] The United States believed that the

30. ANN. REPORT 1977, *supra* note 2, at 17.

31. *Id.* at 6; ANN. REPORT 1978, *supra* note 2, at 7.

32. ANN. REPORT 1976, *supra* note 2, at 6.

33. ANN. REPORT 1978, *supra* note 2, at 10; Political Affairs Div., Bureau of Public Affairs, TTPI, Education for Self-Government Notes, July 26, 1978, at 1 [hereinafter cited as ESG Notes]. The FMS Constitution was approved by voters in Yap, Turk, Ponape, and Kosrae, which now constitute the Federated States of Micronesia. *Id.*

34. ANN. REPORT 1979, *supra* note 2, at 3.

35. *See* Armstrong and Hills, *The Negotiations for the Future Political Status of Micronesia 1980-1984*, 78 AM. J. INT'L L. 484 (1984) [hereinafter cited as Armstrong and Hills].

36. ANN. REPORT 1983, *supra* note 2, at 3; 51 U.N. TCOR Supp. (No. 1) at 1, U.N. Doc. T/1860 (1984) (report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia); 51 U.N. TCOR Supp. (No. 2) at 1, U.N. Doc. T/1865 (1984) (report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands).

37. ANN. REPORT 1983, *supra* note 2, at 12.

38. PALAU CONST. art. XIII, § 6; *see* Armstrong and Hills, *supra* note 35, at 492-93.

39. The Palau Constitution requires that any international agreement which authorizes the use, testing, storage or disposal of nuclear weapons be approved by three-fourths (3/4) of the voters in a referendum. PALAU CONST. art. II, § 3. The Compact

problem had been resolved by its agreement not to use, test, or store nuclear weapons in Palau or Palauan territorial waters.[40] On the strength of that belief, the Compact, as presented by the President, was approved by the United States Congress.[41] The United States then began the process of seeking the agreement of the United Nations to terminate the Trusteeship Agreement, anticipating termination in September, 1986.[42]

The Supreme Court of Palau, however, has again ruled that the Compact is not recognizable as being approved because it has not received 75% of the vote in a plebiscite.[43] While this ruling, combined with the United Nations' refusal to permit piece-meal termination, prevents formal and complete termination, the United States and the remaining new nations have agreed to commence post-trusteeship relations as if the trust had been terminated, bringing the Covenant and the Compact into effect.[44]

Thus, while the Trusteeship Agreement has not been terminated formally,[45] for all practical purposes the former components of the TTPI have achieved post-TTPI status. The effective termination of the TTPI provides an opportunity to review the performances of the American legal system and American judges in Micronesia, and to examine the legal legacy the United States has bestowed upon the Micronesians.

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received a majority but less than 75% of the vote in earlier plebiscites, and the Palau Supreme Court ruled that it was not recognizable as having been approved. ANN. REPORT 1983, *supra* note 2, at 104.

40. This information was provided by Mr. Howard Hills of the Office of Micronesian Status Negotiations. The revised Compact was approved by the Palauan Legislature, and subsequently by 71.8% of the voters in a February, 1986 plebiscite. *See* L.A. Times, Jan. 18, 1986, § I, at 4, col. 2.

41. The House of Representatives originally passed the Compact with several amendments to which the Micronesians objected. N.Y. Times, July 26, 1985, at A4, col. 2. It appeared that additional referenda and ratifications in the TTPI, or even renegotiation of the Compact itself, would be necessary. The Senate originally passed the Compact without amendment. L.A. Times, Nov. 15, 1985, § I, at 7, col. 3. However, the Senate and the House resolved their differences without resort to conference, and approved an acceptable Compact. *See* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

42. The United Nations Trusteeship Council passed, on May 28, 1986, a resolution to the effect that termination of the Trusteeship Agreement was appropriate, and requested the United States and the new nations to agree to an effective date for the Compact and the Covenant not later than September 30, 1986. *See* U.N. Doc. T/L. 1252 (May 27, 1986).

43. *See* Honolulu Advertiser, Oct. 4, 1986, at A-12, cols. 1, 2.

44. Honolulu Advertiser, Nov. 4, 1986, at A-3, cols. 3-6.

45. In addition, there remains some speculation that the Soviet Union will block approval of the Covenant and the Compact by its veto in the United Nations Security Council, the entity that must agree with the United States to terminate the Trusteeship Agreement.

III. THE JUDICIAL STRUCTURE

The Navy introduced an American style court system to Micronesia during World War II. Although the Micronesians had customary laws and dispute resolution mechanisms under the supervision of traditional leaders, they had never developed a formal court system or a codified legal system.[46]

The summary judicial powers exercised by native chiefs and headmen over minor offenses committed by natives were continued at the discretion of the military government.[47] Additionally, the Navy established a military court system to exercise jurisdiction over everyone in the TTPI, except occupation forces and prisoners-of-war. This system paralleled the regular courts martial structure of the United States military, and consisted of three levels with increasing powers of punishment.[48]

After the war, with some native courts already in existence and functioning in accordance with custom, the Military Governor directed the establishment of local native courts.[49] The jurisdiction of these native courts was limited to cases involving natives only, and to offenses against generally recognized native custom or misdemeanors against the police regulations of the military government. Jurisdiction was further limited to amounts in controversy of less than $100.00, and punishment limited to six months imprisonment or a $100.00 fine.[50] The High Court of the Palau Islands, already in existence, was granted both appellate authority over the native court in the Palau district and original jurisdiction with power limited to five years imprisonment or a $500.00 fine.[51] The Military Governor also established a Court of Appeals on Saipan in 1947.[52]

After the Trusteeship Agreement was signed in 1947, and the Navy was formally delegated authority and responsibility to administer the TTPI, the Navy revamped the court system to reflect the structure that, with some modification, prevailed until the termina-

46. The Japanese had established courts and the Micronesians had some experience with that court system. The Navy, upon occupation of the islands, removed Japanese officials and suspended the Japanese Courts. D. RICHARD, UNITED STATES NAVAL ADMINISTRATION OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS, Vol. I, THE WARTIME MILITARY GOV'T PERIOD 1942–1945 247 (1957) [hereinafter cited as RICHARD, Vol. xx].

47. *Id.*

48. Actually, this elaborate court system was unnecessary as the military government had little trouble with the Micronesians. *Id.* at 248. Only the Summary Provost Court in Saipan, presided over by one United States Naval officer, heard a number of cases, mostly for unlawful possession of government property or violation of camp regulations. *Id.* at 473-75.

49. RICHARD, *supra* note 46, Vol. II, THE POSTWAR MILITARY GOV'T ERA 1945–1947 316-17.

50. *Id.*

51. *Id.* at 318, 319.

52. *Id.* at 320.

tion process began. The system initially established by the Navy had six levels: (1) Community Courts, a redesignation of native courts; (2) a Justice Court for each administrative district, staffed by indigenous leaders, with original jurisdiction limited to $1,000.00 in controversy or, in criminal cases, to one year imprisonment or a $1,000.00 fine; (3) a Superior Court in each district, staffed by one United States Naval officer or civil administrator and two indigenous judges; (4) the District Court, a traveling trial court with either the Chief Justice or Associate Justice holding session, assisted by native assessors; (5) the Court of Appeals, a territory-wide appellate court consisting of the Chief Justice and the Associate Justice, both of whom were American lawyers appointed by the Secretary of the Navy; and (6) the Secretary of the Navy, who had the authority to modify decisions of the Court of Appeals.[53]

During the Navy's tenure, the office of the Public Defender and Counselor was established, and staffed by an American attorney.[54] The majority of cases tried were criminal in nature. A Criminal Code was promulgated in 1948, and the District Courts utilized a criminal procedure generally in accord with that of United States federal courts.[55] The Community Courts were left largely to their own devices in terms of procedure so as not to divert the judges' attention from the merits of the cases.[56] Because the Community Court judges were usually local high chiefs, the judicial function was accepted as a normal part of leadership, and, although the adequacy of judges varied, the court system worked well, on the whole, and the decisions were accepted by the people.[57]

The Department of Interior, upon assuming administrative responsibility for the TTPI, streamlined the court system. The Court of Appeals and District Courts merged to become the High Court of the TTPI, the court of final resort. The rarely utilized Superior Courts[58] disappeared. The Justice Courts became District Courts, and the Community Courts remained unchanged. In 1952, the High Commissioner of the TTPI, who possessed both executive and legislative authority, promulgated the Trust Territory Code (TT Code).[59] The judicial structure codified in the TT Code remained unchanged until the late 1970's and early 1980's, when the constitutional governments of the four successor entities began taking shape.

53. RICHARD, *supra* note 46, Vol. III, THE TRUSTEESHIP PERIOD 1947–1951 436-41.

54. *Id.* at 443.

55. *Id.* at 444.

56. *Id.* at 449.

57. *Id.*

58. *Id.* at 441.

59. ANN. REPORT 1958, *supra* note 2, at 12.

The judiciary of the TTPI was independent of the executive and legislative branches of the Trust Territory (TT) government, and was vested in a High Court, a District Court for each administrative district, and a Community Court for each municipality.[60]

A. The High Court

The High Court was composed of a Chief Justice and from one to four Associate Justices, all of whom were American-trained lawyers, and a panel of Temporary Judges, usually from the courts on Guam. The High Court Justices and Temporary Judges were appointed by, and only accountable to, the Secretary of the Interior.[61] The High Court consisted of an Appellate Division and a Trial Division.[62] The TT High Court was paralleled, in structure and function, in the Mariana Islands District from 1952 until 1962 by the Saipan Court of Appeals.[63]

1. The Appellate Division Of The High Court. The Appellate Division had jurisdiction to review on appeal decisions of the Trial Division which were: (1) originally tried in the Trial Division; (2) decided on appeal from a District Court decision involving the construction or validity of any United States law, any TT law or regulation, or any written enactment; or (3) decided on review of a District or Community Court decision in which the lower court's decision was reversed or modified so as to affect a substantial right of the appellant.[64] Additionally, the Appellate Division had discretionary jurisdiction to review directly on appeal decisions of the District or Community Courts involving the construction or validity of any United States law, any TT law or regulation, or any written enactment.[65]

The Appellate Division functioned in panels of three judges assigned by the Chief Justice, although two judges constituted a quorum.[66] When possible, the Appellate Division sat in the District center in which the decision appealed from had been rendered.[67]

2. The Trial Division Of The High Court. The Trial Division was the court of general jurisdiction, and its sessions were held by

60. 5 T.T.C. § 1 (1) (1980).
61. 5 T.T.C. § 201 (1980).
62. 5 T.T.C. § 52 (1980).
63. ANN. REPORT 1958, *supra* note 2, at 13. The Judge of the District Court of Guam served as the Chief Justice of the Saipan Court of Appeals, with Naval officers serving as Associate Justices. *Id.* at 34.
64. 5 T.T.C. § 54(1) (1980).
65. 5 T.T.C. § 54(3) (1980).
66. ANN. REPORT 1965, *supra* note 2, at 37.
67. In cases on appeal from a Trial Division decision, the Justice whose decision was the subject of the appeal was ineligible to serve on the panel.

any one Justice alone. The Trial Division had original jurisdiction over all cases, civil and criminal, and exclusive original jurisdiction over admiralty and maritime matters and adjudication of title to land.[68] Additionally, the Trial Division had appellate jurisdiction to review on appeal decisions of the District Courts,[69] and discretionary jurisdiction to review on the record decisions of the District and Community Courts where no appeal was taken.[70]

The Trial Division functioned in a circuit riding fashion, with a Justice traveling to the district where the case had arisen.[71] Each Justice had a "home" district, and the Trial Division remained in continuous session in those districts.[72] If a given case involved questions of local law and custom, the Justice could select an "assessor", usually a Micronesian District Court Judge, to sit with him at trial and advise him with regard to the local law and custom.[73] The assessors could not participate in the determination of the case. In murder trials, two Special Judges, appointed by the High Commissioner, sat with the High Court Justice, voting equally on questions of fact, the verdict, and the sentence. The Justice alone decided legal issues.[74]

Originally, there was no right to jury trial in the TT. In 1966, the Congress of Micronesia authorized the district legislatures to adopt trial by jury in criminal and/or civil cases.[75] The Mariana Islands District Legislature was the first to do so,[76] and eventually trial by jury was available in other districts as well. Six-person juries were available to decide legal, as opposed to equitable, issues in criminal cases where the potential maximum punishment exceeded five years imprisonment or a $2,000.00 fine, and in civil cases where the amount in controversy exceeded $1,000.00.[77] By these jurisdictional limits, trial by jury was available only in the Trial Division. Jury trial was not available in cases involving annulment, divorce, adoption, or eminent domain.

Pleadings in the High Court could be made in English or indig-

68. 3 T.T.C. § 603 (1980); 5 T.T.C. § 53 (1980); 3 T.T.C. § 262 (1980).

69. The right to appeal a decision of the District Court on both questions of law and fact was absolute. The review in the absence of appeal was automatic in annulment, divorce, and adoption cases. Decisions of "not guilty" in criminal cases could not be reversed. ANN. REPORT 1965, *supra* note 2, at 43.

70. 6 T.T.C. § 54(2) (1980).

71. TRUST TERRITORY OF THE PACIFIC ISLANDS, CRIMINAL JUSTICE PLAN 1977–1978 32 (1977) [hereinafter cited as CJP].

72. ANN. REPORT 1970, *supra* note 2, at 30.

73. 5 T.T.C. § 353 (1980); ANN. REPORT 1965, *supra* note 2, at 22.

74. 5 T.T. C. § 204 (1980); ANN. REPORT 1965, *supra* note 2, at 22; ANN. REPORT 1967, *supra* note 2, at 29.

75. ANN. REPORT 1966, *supra* note 2, at 34.

76. *Id.* at 37.

77. 6 T.T.C. § 801 (1980).

enous languages,[78] and proceedings in the Trial Division ordinarily were translated[79] in open court into the principal language of the district where the trial was held. Further translations were provided in criminal cases where the accused spoke neither English nor the principal indigenous language.[80]

With the exception of those procedures described above, a proceeding before the High Court used procedures that were simpler than those used by a United States District Court sitting without a jury.[81] In the early years, procedural rules were, of necessity, extremely flexible because of the prevalence of Micronesians without formal legal training presenting cases before the High Court.[82] By the mid-1970's, the Chief Justice had revised, approved, and promulgated rules of criminal procedure, civil procedure, evidence, appellate procedure, and disciplinary rules.[83]

B. District Courts

The District Courts each consisted of one Presiding Judge and one or more Associate Judges, and were located in the district centers, with some sub-district courts in certain places.[84] The District Courts had concurrent original jurisdiction with the Trial Division in criminal cases where the potential maximum punishment did not exceed five years imprisonment or a $2,000.00 fine, and in civil cases where the amount in controversy did not exceed $1,000.00, except those cases in which the Trial Division has exclusive jurisdiction.[85] The District Courts also had jurisdiction to review on appeal all cases decided by the Community Courts.[86]

The High Commissioner appointed the District Court judges. After 1975, the appointments were subject to the advice and consent of the Congress of Micronesia. The judges were subject to removal only by the Trial Division for cause and after a hearing, although the High Commissioner could decline to renew their appointments at the end of their terms.[87] The judges were mature Micronesian laymen appointed because they had prestige and considerable status in their communities.[88] There were no formal qualifications with respect to background in legal process or familiarity

78. ANN. REPORT 1965, *supra* note 2, at 41.
79. Micronesian Clerks of Court usually served as interpreters, and parties and counsel were urged to bring their own translators to check the official translation.
80. CJP, *supra* note 71, at 34.
81. *Id.*
82. ANN. REPORT 1958, *supra* note 2, at 13.
83. ANN. REPORT 1977, *supra* note 2, at 21.
84. CJP, *supra* note 71, at 32.
85. 5 T.T.C. § 101 (1980).
86. *Id.*
87. 5 T.T.C. § 251 (1980).
88. ANN. REPORT 1965, *supra* note 2, at 22; CJP, *supra* note 71, at 95.

with the law, nor any certification provisions in the appointment process.[89] The Administering Authority made efforts to provide some legal training to appointed Micronesian judges by means of correspondence courses through American institutions and workshops held by the High Court Justices.[90]

The District Courts played an important role in the administration of justice. If a District Court determined that a case could be properly handled in Community Court, it had the authority to transfer the case to the lower court. The court also had discretion to hear a case within its concurrent jurisdiction with the lower court if the case could be heard without inconvenience to the parties and witnesses and without undue delay.[91] The District Courts, with approximately 20 judges, usually handled twice as many matters in a given year as did the Community Courts, which had approximately 100 judges. District Courts were not characteristically courts of record. On motion, however, the judge could decide to sit as a court of record and have a transcript recorded and prepared.[92]

C. Community Courts

Community Courts existed in each municipality in the TT and had original jurisdiction with the Trial Division and District Court. In criminal cases, jurisdiction was limited to potential maximum punishment of six months imprisonment or a $100.00 fine. In civil cases other than those over which the Trial Division had exclusive jurisdiction, the jurisdictional limit was $100.00.[93]

Community Court judges were nominated by popular vote or otherwise selected in accordance with the wishes of the people and consistent with the proper administration of justice.[94] The District Administrator appointed the nominee to a fixed term, and judges so appointed were subject to removal only by the Trial Division for cause and after a hearing.[95] The judges served part-time and were uniformly Micronesian.[96]

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89. The performance of the District Courts depended upon the abilities of the judges rather than upon the system which appears to have been adequate. Some District Court Judges, unable to discharge their duties in a businesslike manner, should not have been on the bench. Other judges were excellent jurists, under whom the District Courts functioned well. CJP, *supra* note 71, at 63.

90. ANN. REPORT 1972, *supra* note 2, at 33; ANN. REPORT 1973, *supra* note 2, at 33; ANN. REPORT 1974, *supra* note 2, at 33.

91. CJP, *supra* note 71, at 44-45; 5 T.T.C. § 403 (1980).

92. CJP, *supra* note 71, at 45-46.

93. 5 T.T.C. § 151 (1980).

94. 5 T.T.C. § 302 (1980).

95. 5 T.T.C. § 301 (1980).

96. There were no Micronesia judges on Kwajalein Island, Kwajalein Atoll, and the Marshall Islands, where the United States maintained a missile testing facility, due to the policy of excluding natives from those facilities. *See* CJP, *supra* note 71, at 34.

The functioning of the Community Courts appears to have remained a mystery to American administrators.[97] Proceedings were conducted in indigenous languages, and procedure was left largely to the discretion of the judges, so long as that judgment or custom was not inconsistent with law and did not militate against a just determination of the issues.[98] Community Courts were not courts of record, and detailed data of decisions is mostly nonexistent. The value of the Community Courts varied among the districts. In 1975, no new judges were appointed in Yap following expiration of the then existing judges' terms, apparently because they were not needed.[99]

D. The Legal System

It was common practice, especially in the early years, for Micronesians with no formal legal training to handle cases in the TT courts.[100] Eventually, American-trained attorneys from the government or government-supported offices functioned as counsel in the majority of cases before the High Court. There was, and continues to be, a paucity of private attorneys in the TT.[101]

1. The Public Defender. The office of the Public Defender, headquartered on Saipan, provided legal counsel for accused persons in the TT.[102] It also provided legal aid and assistance, which included representation before the High Court, to indigent persons in civil cases.[103] The Public Defender maintained offices in each district and in some sub-districts but did not have enough attorneys to station one in each office.[104] The Public Defender himself, or an attorney on his staff, represented persons before the Trial Division who faced a sentence of five years or more.[105] The attorneys in the Public Defender's office carried out their duties in circuit-riding fashion for the most part although, at one point, the Chief Public Defender in Palau was a Palauan trained in an American law school who handled cases in the Trial Division and in District Court.[106] Some use was made of Peace Corps volunteer lawyers as defense counsel before the Trial Division. The lack of experience of some individuals acting as defense counsel apparently raised some con-

97. *Id.* at 62.
98. *Id.* at 108.
99. ANN. REPORT 1975, *supra* note 2, at 22.
100. ANN. REPORT 1958, *supra* note 2, at 13.
101. ANN. REPORT 1983, *supra* note 2, at 35.
102. ANN. REPORT 1965, *supra* note 2, at 45.
103. ANN. REPORT 1965, *supra* note 2, at 45; CJP, *supra* note 71, at 38.
104. CJP, *supra* note 71, at 37.
105. ANN. REPORT 1965, *supra* note 2, at 45.
106. CJP, *supra* note 71, at 38.

cerns as to whether defendants were adequately represented.[107]

Micronesian trial assistants, whose training in the law was for the most part on-the-job, acted as defense counsel in the District Courts.[108] Trial Assistants were stationed in each district and subdistrict office and generally performed in a highly competent manner. Some Trial Assistants were selected to attend law schools in America or Papua New Guinea.[109]

2. District Attorney. Prosecution of all felony cases before the Court was performed by District Attorneys who were American-trained lawyers. They were assigned to each district center, and were under the general supervision of the Attorney General of the TT.[110] The District Attorneys also functioned as chief legal officers of the districts, and represented the TT government in civil cases in which the government was a party or had an interest.[111] The staff of the District Attorneys' office included Prosecution Trial Assistants who prosecuted cases before the District Courts. Thus, in a typical criminal case in the District Courts, the adversaries would be Micronesian Trial Assistants.[112]

3. The Micronesian Legal Services Corporation. In 1971, the Micronesian Legal Services Corporation (MLSC) became the third entity to have American-trained attorneys appearing before the High Court.[113] The MLSC operated a legal office in each district, and employed attorneys and trial assistants to provide legal services to indigent persons in suits against the TT government and other parties.[114] Because both parties to litigation were usually indigent, it was common that in civil cases that one party would be represented by MLSC and the other by the Public Defender's office.[115]

4. Procedure. The opinions of the TT High Court illustrate the changing nature of courtroom procedure and the rising expectations of the Justices. In earlier cases, particularly on appeal from District Court decisions, procedural matters were flexible in the extreme. The Court was not concerned with fine points of evidence but with substantive justice[116] and, on occasion, would consider

107. *Id.* at 114.

108. *Id.* at 37.

109. ANN. REPORT 1975, *supra* note 2, at 7.

110. CJP, *supra* note 71, at 37; ANN. REPORT 1971, *supra* note 2, at 41; ANN. REPORT 1974, *supra* note 2, at 24.

111. CJP, *supra* note 71, at 37; ANN. REPORT 1971, *supra* note 2, at 41.

112. CJP, *supra* note 71, at 37.

113. ANN. REPORT 1971, *supra* note 2, at 42.

114. ANN. REPORT 1972, *supra* note 2, at 109.

115. CJP, *supra* note 71, at 38.

116. Bisente v. Trust Territory, 1 T.T.R. 327 (Tr. Div. Yap 1957).

matters outside the record.[117] However, parties were obligated to make an honest effort to comply with the requirements of law and procedure.[118] When the Court found it necessary to reverse the decision of a lower court, the trial was simply reopened, the mistake excised, and the trial proceeded to findings and judgment.[119]

However, as the judicial system matured, and formally trained attorneys became more common, the High Court became more exacting in its requirements. The first jury trial in the TTPI was reversed for a whole laundry list of errors.[120] In its opinions, the Court admonished counsel for poorly written briefs,[121] ignoring appellate procedure,[122] slipshod methods,[123] and being less than truthful with the Court.[124] In one opinion, *Kabua v. Trust Territory*,[125] the Court excoriated both the Attorney General and the Public Defender for unconscionable delay which resulted in an innocent man going to jail. The Court became almost draconian in striking briefs and dismissing appeals filed as little as one day late.[126] One overdue feature of the Court's increased strictness was in holding attorneys to the ethical standards adopted by the Court.[127]

IV. THE PRESENT JUDICIAL STRUCTURE

The United States administration made conscious efforts to encourage the Micronesians to seek solutions within the American-style judicial process.[128] Some High Court Justices made a practice of explaining their rulings and the reasons behind them from the bench, in an attempt to develop an American sense of public morals, and to make clear the basic concepts of American law to the Micronesians.[129]

Some American observers have asserted that the concept of justice in its western form is not that workable in Micronesia,[130]

117. Marbou v. Trust Territory, 1 T.T.R. 269 (Tr. Div. Palau 1955).

118. Gaamew v. You, 2 T.T.R. 98 (Tr. Div. Yap 1959).

119. Ngirmidol v. Trust Territory, 1 T.T.R. 273 (Tr. Div. Palau 1955); Borja v. Trust Territory, 1 T.T.R. 280 (Tr. Div. Palau 1955).

120. "Iroij" on Jebdrik's Side v. Jakeo, 5 T.T.R. 670 (App. Div. 1972).

121. Ngiralois v. Trust Territory, 4 T.T.R. 517 (App. Div. 1969).

122. Debesol v. Trust Territory, 4 T.T.R. 556 (App. Div. 1969).

123. Edwards v. Trust Territory, 7 T.T.R. 507 (App. Div. 1977).

124. Quitagua v. Mendiola, 5 T.T.R. 347 (App. Div. 1970).

125. 7 T.T.R. 541 (App. Div. 1977).

126. Rimirch v. Udui, 7 T.T.R. 619 (App. Div. 1978); San Nicholas v. Bank of Am., 6 T.T.R. 568 (App. Div. 1973).

127. Abrams v. Trust Terr. H.C. Biscip. Panel, 7 T.T.R. 517 (App. Div. 1977). The opinion is startling for the blatant character of the ethical violation, and the fact that the American attorney failed to see anything wrong in what he had done.

128. ANN. REPORT 1969, *supra* note 2, at 54.

129. TOOMIN & TOOMIN, BLACK ROBES AND GRASS SKIRTS 83-4, 210-11 (1963) [hereinafter cited as TOOMIN].

130. NEVIN, *supra* note 4, at 29.

that the linear logic system and analysis of causation employed in the American legal system is fundamentally contrary to the "holistic" or "circular" thought patterns of Micronesians.[131] This objection has been considered and explicitly rejected by the newly established Supreme Court of the FSM.[132] The Micronesians, after thirty years of experience with an American legal system, view their judiciary as functioning quite effectively.[133] The fact is that the citizens of Micronesia uniformly adopted judicial structures virtually identical to the TT model.

A. Federated States Of Micronesia

The FSM has adopted a federal form of government based upon the model of the United States government.[134] There is a national government established by the Constitution of the FSM, and state governments, each established under a separate Constitution, in the four member states of Yap, Truk, Ponape, and Kosrae.[135] The judicial power of the national government is vested in a Supreme Court, and in such inferior courts as may be established by statute.[136] No inferior courts presently exist.

The FSM Supreme Court is almost identical to the TT High Court. It is composed of a Chief Justice and not more than five Associate Justices, and consists of a trial division and appellate division.[137] The Justices are appointed by the President of the FSM with the approval of two-thirds of the FSM Congress.[138]

The trial division, which holds sessions before one Justice, has exclusive original jurisdiction in cases affecting foreign officials, disputes between states, admiralty or maritime cases, and cases, except land disputes, in which the national government is a party.[139] The trial division has concurrent original jurisdiction with the state courts in cases arising under the FSM Constitution, national laws, treaties, and in diversity of citizenship cases.[140]

The appellate division, which sits in panels of at least three Justices, has jurisdiction to review cases heard in the trial division

131. *Id.* at 50-58; *see also* Explanation of Rules for Admission to Practice before the Supreme Court of the FSM, 8-9 (June 30, 1981) [hereinafter cited as Explanation of FSM Rules].

132. *See* Explanation of FSM Rules, *supra* note 131, at 11-15.

133. C. HEINE, MICRONESIA AT THE CROSSROADS 85 (1974) [hereinafter cited as HEINE].

134. *See* Hughes and Laughlin, *Key Elements in the Evolving Political Culture of the Federated States of Micronesia*, 6 PAC. STUD. 71 (1982).

135. ANN. REPORT 1983, *supra* note 2, at 4, 7, 11, 12, 14-15.

136. FSM CONST. art. XI, § 1.

137. *Id.* at § 2.

138. *Id.* at § 3.

139. *Id.* at §§ 2, 6(a).

140. *Id.* at § 6(a).

and cases heard in state courts requiring interpretation of the FSM Constitution, national law, or treaties. If the State Constitution so provides, the appellate division has jurisdiction to review other cases on appeal from the highest state courts.[141]

Each of the four states presently has functioning state courts which, for the most part, appear to be filling the role of the old TT District Court.[142]

The Chief Justice of the Supreme Court has promulgated rules of civil procedure, criminal procedure, and evidence which are essentially slightly modified versions of the rules previously used by the TT High Court. The Chief Justice has also promulgated rules for admission to practice before the FSM Supreme Court. The rules for admission contain a "grandfather" clause admitting attorneys admitted to practice before the TT High Court,[143] but otherwise require that applicants be residents or domiciliaries of the FSM.[144] The stringent residency requirement is ameliorated somewhat by provisions for admission *pro hac vice* and an indication that reciprocity with other jurisdiction would be welcomed.[145] The rules also adopt the ABA's Model Rules of Professional Conduct as applying to attorneys in the FSM.[146]

B. The Republic Of The Marshall Islands

The delegates to the Marshall Islands Constitutional Convention also appear to have been satisfied with the American court system to which they were exposed. The Marshall Islands Constitution basically adopts the TT court system, with some modification. Unlike the FSM and Palau, the RepMar has not maintained the TT structure of one High Court with appellate and trial divisions.

The functions formerly performed by the TT High Court are divided between a Supreme Court (appellate division) and a High Court (trial division).[147] The Supreme Court consists of a Chief Justice and other judges as may be provided for by legislation. The Court has appellate jurisdiction as to both questions of law and fact from any final decision of the High Court in the exercise of its original jurisdiction, and any final appellate decision of the High Court if the High Court certifies that the case involves a substantial question

141. *Id.* at §§ 2, 7.

142. ANN. REPORT 1981, *supra* note 2, at 17. *See, e.g.*, ANN. REPORT 1983, *supra* note 2, at 11 (in the case of Truk, the Presiding Judge of the TT District Court became the first Chief Justice of the new Truk State Court).

143. Rules for Admission to Practice before the Supreme Court of the FSM, para I.

144. *Id.* at para. II.C.

145. *Id.* at para. VIII.

146. Id. at para. VII.

147. REPMAR CONST. art. VI, § 1(1).

of law as to the interpretation of the constitution. The Supreme Court also has discretionary appellate jurisdiction over any final decision of any lower court.[148]

The High Court consists of a Chief Justice and such other judges as may be provided for, and is the court of general jurisdiction. The court has original jurisdiction over all duly filed controversies of law and fact, and appellate jurisdiction over cases originally filed in subordinate courts. The court also has jurisdiction to review the legality of any final determination by a government agency, unless otherwise provided by law.[149] The High Court currently consists of a Chief Justice and one Associate Justice.

Although not mandated by its Constitution, the RepMar has incorporated the TT District and Community Courts into its judicial system.[150] The jurisdiction of the District Court has been limited to criminal cases where the potential maximum punishment does not exceed three years imprisonment or a $2,000.00 fine, and to civil cases where the amount in controversy does not exceed $1,000.00. The District Court may also hear cases on appeal from the Community Courts.[151]

There are approximately 20 Community Courts in the RepMar with jurisdiction limited to criminal cases in which the potential maximum punishment does not exceed six months imprisonment or a $700.00 fine, and to civil cases in which the amount in controversy does not exceed $100.00. The Community Courts may not exercise jurisdiction in admiralty, maritime or land title cases regardless of the amount in controversy.[152]

The RepMar Constitution created a new judicial entity—the Traditional Rights Court.[153] This court presently consists of nine judges, three from each traditional class of Marshallese land-holders: iroij lablab, alab, and dri jerbal. The judges are appointed by the Chief Justice of the High Court and sit in panels of three (one from each land-holder class) to determine questions of title or land rights or other legal interests depending wholly or in part upon customary law and traditional practice in the RepMar.[154] The court only rules on questions certified to it by trial courts in which cases involving such questions are pending. Although the decisions of the Traditional Rights Court are entitled to great weight, they are not binding on the trial court.[155]

148. *Id.* at § 2.
149. *Id.* at § 3.
150. ANN. REPORT 1983, *supra* note 2, at 36.
151. *Id.*
152. *Id.*, at 35.
153. REPMAR CONST. art. VI, § 4.
154. *Id.*; ANN. REPORT 1983, *supra* note 2, at 37.
155. REPMAR CONST. art. VI, §§ 4(4), (5).

The Chief Justice of the High Court, the Attorney General, and one other person appointed by the Cabinet form the Judicial Service Commission (JSC), a very important judicial entity.[156] The Justices of the Supreme Court and High Court are recommended by the JSC and appointed by the Cabinet with the approval of the Nitijela, the Marshall Islands legislature.[157] The JSC appoints and removes judges of the District and Community Courts, and performs other administrative duties.[158]

The Chief Justices of the High Court and Supreme Court have promulgated rules of civil procedure, appellate practice, and rules for admission to practice. As in the FSM,[159] attorneys admitted to practice before the TT High Court are granted admission by a "grandfather" clause.[160] The RepMar does not have a residency requirement, but does require of admitted attorneys a "substantial commitment toward helping the people of the Marshall Islands in their needs for legal assistance."[161]

The ABA's Code of Professional Responsibility is made applicable to attorneys in the RepMar, and the High Court has manifested an intent to hold attorneys strictly to those standards.[162]

C. Republic Of Palau

Palau has also largely adopted the TT judicial structure. The judicial authority of Palau is vested in a Supreme Court, a National Court, and other inferior courts as may be established by law.[163] The Supreme Court, which echoes the old TT High Court, is composed of a Chief Justice and three to six Associate Justices, and consists of a trial division and an appellate division. The appellate division sits in panels of three Justices, and has appellate jurisdiction to review all decisions of the trial division and all decisions of lower courts.[164]

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156. The RepMar's court system has been criticized as a "conundrum" because, although the Supreme Court is the highest court in the land, most of the authority and responsibility is vested in the Chief Justice of the High Court. Meller, *The Ralik Ratak Draft Constitution*, 1 MICRONESIAN PERSP., Dec. 1977, at 1, 4. This criticism is misplaced. The decision to delegate administrative responsibility to the trial court is not intrinsically unsound; in practice, the system appears to function well without friction between the respective Chief Justices.

157. REPMAR CONST. art. VI, §§ 1(4), 5(1).

158. *Id.* at § 5(3).

159. *See supra* text accompanying note 143.

160. Rules for Admission to Practice Law before the Courts of the Republic of the Marshall Islands, Rule I.A. [hereinafter cited as Rules for Admission, Repmar].

161. *Id.* at Rule VI.

162. *Id.* at Rule V.A.(4); *see* Kapua v. Kwajalein Atoll Corp., Civil Action No. 1984-102 (law firm disqualified for violation of DR 5-105); *see also* Kabua v. Kabua, Civil Action No. 1984-98 (attorney disqualified for violation of DR 7-104).

163. PALAU CONST. art. X, § 1; ANN. REPORT 1981, *supra* note 2, at 20.

164. PALAU CONST. art. X, § 3.

The trial division hears matters before any one Justice, and has exclusive original jurisdiction over cases involving Ambassadors, Public Ministers or Consuls, admiralty and maritime matters, and cases in which the national government or a state government is a party. In all other cases, the trial division has original jurisdiction concurrent with the National Court.[165]

The Supreme Court is directed by the Constitution to promulgate rules governing the administration of the courts, legal and judicial professions, and practice and procedure in civil and criminal matters.[166]

D. Commonwealth Of The Northern Mariana Islands

Because the Commonwealth of the Northern Mariana Islands (CNMI) will become a United States Commonwealth, as opposed to a freely associated state, its court system has been integrated into the United States mainland judicial system to a large degree. The judicial authority of the CNMI is vested in a Commonwealth Trial Court with original jurisdiction over matters involving interests in land regardless of the amount in controversy.[167] The trial court's jurisdiction also includes civil actions, not involving land, in which the amount in controversy does not exceed $5,000.00, and criminal prosecutions in which the potential maximum punishment does not exceed five years imprisonment or a $5,000.00 fine.[168]

The CNMI Constitution and the Covenant authorize the CNMI legislature to create a Commonwealth Appeals Court, but one has not been established.[169] Rather, a United States District Court for the District of the Northern Mariana Islands has been established, consisting of a trial division and an appellate division.[170] The trial division has original jurisdiction over cases in excess of the Commonwealth Trial Court's jurisdiction, and in federal question and diversity actions irregardless of the amount in controversy. The appellate division has jurisdiction to review on appeal all decisions of the Commonwealth Trial Court and decisions of the trial division involving issues of local law.[171]

The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction over final decisions of the trial division of the District Court in federal question and diversity actions, and over the decisions of the appellate division. The United States Supreme Court has certiorari jurisdiction over the decisions of the Ninth

165. *Id.* at § 5.
166. *Id.* at § 14.
167. ANN. REPORT 1978, *supra* note 2, at 31.
168. CNMI CONST. art. IV, § 2.
169. *Id.* at § 3; Covenant, *supra* note 22, at art. IV, § 402(c).
170. Pub. Law No. 95-157, 91 Stat. 1265 (1977).
171. ANN. REPORT 1979, *supra* note 2, at 20.

Circuit.[172]

E. Transition

During the period of transition, while court systems were being established pursuant to the constitutions of the various entities, the laws and courts of the TTPI remained in full force and effect and continued to function. The TT Code and applicable district laws and municipal ordinances in effect on the effective dates of the new Constitutions are explicitly recognized as continuing in force and effect by the new governments and by the United States government[173] until they expire, are repealed, or are modified. Although this scheme provides stability and continuity, it is not very workable. As a rule, especially in the freely associated states, enactments of the new legislatures have not been compiled, and the TT Code has not been updated to reflect which sections are no longer in force. Thus, finding effective statutory law is extremely cumbersome.[174]

The TT Courts remained functioning in the former administrative districts until the newly created judicial systems were constituted and prepared to assume jurisdiction.[175] The establishment of a United States District Court in Saipan ended the role of the TT Courts in the former Marianas District.

Transition in the freely associated states was more complex. The TT Courts continued to function in accordance with TT law until the FSM, RepMar, and Palau established functioning courts in accordance with their respective constitutions. The determination that a given court was in existence and functioning was made in writing by the Chief Justice of the TT High Court.[176] The national courts in each freely associated state and the state courts in the member states of the FSM have all been certified. Upon certification, pending cases not in active trial were transferred from the TT courts to the appropriate functioning court of the new jurisdiction.

The Appellate Division of the TT High Court retains jurisdiction, by writ of certiorari, to entertain appeals from the courts of last resort of the freely associated states.[177] In the RepMar and Pa-

172. Pub. Law No. 95-157, 91 Stat. 1265 (1977).

173. Sec. Int. Ord. No. 2989 pt. IV, § 1; Sec. Int. Ord. No. 3027, § 5; CNMI CONST. Schedule on Transitional Matters, § 2; FSM CONST. art. XV, § 1; REPMAR CONST. art. XIII, § 1; PALAU CONST. art. XV, § 3.

174. For example, in the RepMar, one would research the TT Code and then search each subsequent year's compendium of laws passed by the Nitijela to determine if the TT Code has been repealed or modified, or if a new law bearing on the subject has been passed.

175. Sec. Int. Ord. No. 2989 pt. XII; Sec. Int. Ord. No. 3039, § 5.

176. Sec. Int. Ord. No. 3039, § 5a.

177. Id. § 5b.

lau, upon certification of the national courts, the existing TT District and Community Courts were absorbed into the new judicial systems. This circumstance, combined with the fact that the national trial courts had general jurisdiction, made transition relatively easy.

F. FSM Transitional Problems

In the FSM, the transition process was more complex. The Supreme Court of the FSM was certified and began its operations before the state courts in Yap, Truk, Ponape, and Kosrae were certified. The trial division of the Supreme Court is limited in original subject matter jurisdiction to those cases, *inter alia*, arising under national law.[178] The particular national law that created controversy concerning the Supreme Court's subject matter jurisdiction was the National Criminal Code (NCC), which became effective on July 12, 1981. The NCC is national law and defines "major crimes," the prosecution of which are thus within national jurisdiction. The NCC further repealed the title of the TT Code that contained criminal statutes to the full extent of FSM national jurisdiction in matters contained therein. As a result, the criminal provisions of the TT Code which are duplicated or covered in the NCC are repealed. The NCC also contains a "savings" clause providing that the NCC does not apply to offenses committed before its effective date, and that prosecution of those offenses is governed by prior law as though the NCC were not in effect.[179] This situation created difficulties in two ways.

First, for some offenses committed after the effective date of the NCC, the activities of the accused constituted an offense under the TT Code, but did not rise to the level of a "major crime" as defined in the NCC. Thus, while larceny under the TT Code required that the property taken exceed $50.00, the NCC requires a value of $1,000.00 and, therefore, a larceny of between $50.00 and $1,000.00 still constitutes a crime, but is not within the jurisdiction of the Supreme Court.[180] Similarly, while the NCC requires that the crime of escape involve the national interest, the TT Code contained no such requirement; therefore, an escape not involving the national interest is not within the jurisdiction of the Supreme Court.[181]

Second, the subject matter jurisdiction of the Supreme Court was called into question where offenses were committed before the

178. *See supra* note 136.
179. National Criminal Code, *codified as* 11 FSM Code § 101 *et seq.* (1982).
180. FSM v. Hartman, 1 FSM Intrm. 43 (Truk 1981).
181. Truk v. Hartman, 1 FSM Intrm. 174 (Truk 1982).

effective date of the NCC. In the *Otokichy* cases,[182] defendants were charged with committing torture and attempted murder on or about March 7, 1981, four months prior to the effective date of the NCC. The Trial Division of the FSM Supreme Court held that it did not have jurisdiction because the TT Code was not "national law" before July 12, 1981 and the NCC did not apply, by its very terms, to offenses committed before that date. Thus, the Trial Division of the TT High Court would have to exercise its "clean-up" jurisdiction.[183]

The Appellate Division of the FSM Supreme Court disagreed, and reversed.[184] The panel reasoned that the NCC repealed the TT Code to the extent that its provisions were covered by FSM national jurisdiction, i.e., "major crimes." Torture and attempted murder are major crimes under the NCC. Therefore, prosecution of these offenses would have been barred because the TT Code provisions covering them had been repealed, and applying the NCC to them would violate the ban on ex post facto laws, except for the fact that prosecution under the old TT Code was specifically authorized by the NCC.[185] Under this view, the "savings" clause incorporated the "saved" provisions of the TT Code into the NCC, and these provisions thereby became national law, within the subject matter jurisdiction of the FSM Supreme Court's Trial Division.

The Appellate Division of the High Court of the TT exercised its certiorari powers, granted by the Secretary of the Interior, to review the FSM Supreme Court's decision in *Otokichy*.[186] The High Court reversed the FSM Supreme Court, holding that subject matter jurisdiction over the case was vested in its own Trial Division.[187] Under the High Court's view, if prosecution of these offenses were to proceed as though the NCC was not in effect, the NCC could not operate to incorporate the TT Code into "national law."[188]

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182. Truk v. Otokichy, 1 FSM Intrm. 127 (Truk 1982).

183. *Id.*

184. In Re Otokichy, 1 FSM Intrm. 1983 (App. 1983).

185. 11 FSM Code § 102 (1982) (prosecutions for such offenses "are governed by the prior law which is continued in effect for that purpose, as if the Code were not in force.").

186. *See supra* note 182.

187. Otokichy v. Appellate Division, Cert. No. C-2-82 (TT High Ct. App. Div. 1983), *discussed in* Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The Otokichy Cases*, 5 U. HAWAII L. REV. 57 (1983) [hereinafter cited as Bowman]. The High Court apparently did not find the Supreme Court's incorporation artument very persuasive, and applied the "savings" clause in the simplest, most straight-foward manner. *Id.*, slip op. at 11.

188. The interesting aspect of the case is the unanswered question of why the High Court chose to exercise its certiorari powers. *Id.* at 74, 76-77. The High Court did not step in to protect the defendants against a deprivation of their fundamental rights. Nor

The major impact of the decision is on the allocation of power within the FSM.[189] The Trial Division of the FSM Supreme Court possesses limited original jurisdiction, while the state courts are courts of general jurisdiction, and the effect of the NCC is to separate the two. Thus, the action of the High Court might be seen as enforcing the limits set forth by the FSM Congress against an overreaching court.[190]

On the other hand, the crimes involved in the *Otokichy* case were unusual in their severity for Micronesia, and the defendants had been terrorizing the inhabitants of an outer island in Truk.[191] The FSM had an interest in taking the defendants into custody, prosecuting and punishing them, thereby establishing the legitimacy, independence, and authority of the new nation.[192] The High Court's exercise of certiorari, while not rising to the level of "bullying and demeaning of a constitutional government," as has been charged,[193] does betray a lack of sensitivity to this desire on the part of the FSM to fully exercise its independent authority. The FSM Congress does not need the TT High Court to protect it from its own Supreme Court.[194]

V. AMERICAN JUSTICE AND MICRONESIAN CUSTOM

The most interesting facet of the development of American-style legal systems in Micronesia is the impact of American jurisprudence on the customs and traditions of the Micronesians. The

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could the action have been taken to preserve the TT High Court's jurisdictional "territory" against incursion by the new court. The prosecution of persons under the old TT Code in the courts of the freely associated states is not void for want of subject matter jurisdiction because such action is clearly contemplated by Sec. Int. Ord. No. 3039, *see supra* note 176, and such actions were prosecuted in the court of Palau and the RepMar without objection by the High Court. Further, protection of the High Court's jurisdiction would be of brief effect, as the Court will cease to exist upon termination of the Trusteeship Agreement.

189. *See* Bowman, *supra* note 187, at 74-75.

190. The FSM Supreme Court has been very aggressive in determining the limits of its own powers. In Lonno v. Trust Territory, 1 FSM Intrm. 53 (Kos. 1982), the court held that it had jurisdiction over suits against the TT government, despite 6 TTC § 251 which vests exclusive original jurisdiction over such cases in the Trial Division of the TT High Court, and despite the fact that Sec. Int. Ord. No. 3039 § 5(a) provided that, upon certification, all cases except suits against the TT government would be transferred to the newly constituted court. In In Re Iriarte (I), 1 FSM Intrm. 239 (Pont. 1983) the court quashed a contempt citation issued by the Trial Division of the TT High Court.

191. *See* Truk v. Otokichy, *supra* note 182; Bowman, *supra* note 187, at 68.

192. To this end, the FSM government intervened in the case, which originally had been filed in the TT High Court's Trial Division by way of successful motion to transfer to the FSM Supreme Court. Bowman, *supra* note 187, at 68-69.

193. Bowman, *supra* note 187, at 78.

194. The FSM Congress controls the original jurisdiction of the Supreme Court to the extent that it controls what constitutes "national law" and what does not. FSM CONST. art. XI, § 6(b).

United States recognized at an early stage the importance of the customs and customary law which the Micronesians had developed over centuries and which affected virtually every aspect of their lives.[195]

A. Statutory Recognition Of Custom

The obligation of the United States to "give due recognition to the customs of the inhabitants in providing a system of law for the territory" is established in the Trusteeship Agreement.[196] The official position of the Administering Authority was that local customs not in conflict with the TT Code, the Trusteeship Agreement, or with applicable laws of the United States, including executive orders of the President, were recognized in the TT.[197]

The TT Code included customary law as a source of law in the TT, albeit one of relatively low priority,[198] and recognized it as having the full force and effect of law so long as not in conflict with the others laws applicable to the TT.[199] Moreover, local customary law was given priority over American common law, in the absence of any superior written law.[200] In recognition of the fact that previous foreign administrations had imposed certain changes on the customary land tenure patterns, which could not be realistically untangled, the Code "froze" the land law in effect on December 1, 1941, subject to modification by subsequent express written enactment.[201]

Additionally, the Code required courts to give due recognition to custom in imposing sentence,[202] and provided that violations of custom could be prosecuted as crimes even if not otherwise set forth in the Code.[203] Eventually wills made and domestic relations, i.e., marriages, divorces, annulments, and adoptions, performed in accordance with custom were explicitly recognized in the Code.[204]

Each of the new states has made explicit in its Constitution the importance of custom and traditional rights. Additionally, the TT

195. Immediately upon coming into posession of the TT, the United States deployed anthropologists to investigate and collect data on Micronesian customs and traditions. *See* Mason, *Applied Anthropology in the TTPI*, in HISTORY OF THE U.S. TRUST TERRITORY OF THE PACIFIC ISLANDS 35-37 (K. Knudsen ed. 1985) [hereinafter cited as Mason]. The compiled data was frquently used by the TT High Court. *See generally* STAFF ANTHROPOLOGIST, TRUST TERRITORY OF THE PACIFIC ISLANDS, LAND TENURE PATTERNS (1958) [hereinafter cited as LAND TENURE PATTERNS].

196. Trusteeship Agreement, *supra* note 1, at art. 6.1.

197. ANN. REPORT 1966, *supra* note 2, at 23.

198. 1 TTC § 101 (1980).

199. 1 TTC § 102, previously codified as TTC § 21.

200. 1 TTC § 103, previously codified as TTC § 22.

201. 1 TTC § 105, previously codified as TTC § 24.

202. 11 TTC § 1451 (1980).

203. 11 TTC § 8, previously codified as TTC § 434.

204. 39 TTC § 4, 55; 13 TTC § 2.

Code provisions dealing with custom have been adopted wholesale or largely integrated by the new states.

B. Trends Common To The Entire TTPI

The attitude of the TT government, including the High Court, toward custom has been characterized as recognizing and giving custom the full force and effect of law, so long as it was convenient to do so.[205] The High Court's opinions manifest four pronounced trends: (1) incorporation of foreign legal concepts; (2) evolution of customary land tenure toward individual ownership; (3) hostility toward "unfair" aspects of the customary systems; and (4) the giving way of customary law when it became "inconvenient" to the administration of justice. The remainder of this Note examines each of these trends. It will further examine the way in which the Court dealt with certain customs in each of the former districts.

For the most part, High Court Justices made sincere and diligent attempts to comprehend[206] and apply customary law in a fair and even-handed manner. Their efforts were hampered by the fact that the Micronesian cultures are basically particularistic,[207] meaning that great loyalty and favor is given by the individual to his clan, lineage, or family to the exclusion of others. This particularistic quality is a product of the need to co-exist peacefully on small islands and the necessary suppression of individual competitiveness and emphasized consensus within social groups.[208]

The particularistic character of Micronesian customs came into conflict with the American concept of the impartial administration of justice according to fixed and overarching neutral principles.[209] Traditional leaders actively used their power to gain advantage in the adjudicatory process when their interests were at stake. Witnesses refused to testify, and evidence, records of motions and pleadings, and court records disappeared and frustrated the adjudicatory process.[210] The result of this particularism, specifically

205. The expression is that of a former TT Public Defender, and is fairly accurate. A continuous erosion of customary law by American legal concepts is discernable in the opinions of the TT High Court. In large measure, this process was not intentional, but a natural result of American lawyers' attempts to fit Micronesian concepts onto a matrix of American legal ideas.

206. It is beyond the capacity of this writer to evaluate how accurately the High Court Justices discerned the customary law. The only material available with which to compare the holdings of the American judges is the findings and understandings of American anthropologists.

207. CJP, *supra* note 71, at 60-61.

208. Nevin, *supra* note 4, at 51-54. Competitiveness developed not between individuals, but rather between social groups; Micronesians demonstrate harsh prejudices toward people from "outside", from different islands or villages. *Id.* at 52, 53-54.

209. CJP, *supra* note 71, at 101.

210. *Id.* at 102.

in terms of cases involving customary issues, was that the most difficult aspect of adjudicating customary issues was not in applying custom, but in determining what the custom was.

Additionally, customary law is by nature flexible and adaptive, as opposed to a collection of immutable legal rules which can be applied mechanically to a given factual pattern. Combined with its particularistic nature, the flexibility of custom led the Administering Authority to state, with some exasperation, "[l]ocal custom is usually what any given party wants it to be and little agreement can be reached."[211]

The courts reacted by relying primarily upon a select group of assessors and American anthropologists acting as expert witnesses to advise them as to customary law.[212] A kind of super-privilege was created for anthropologists, enabling them to investigate and disclose their findings without revealing the identities of their sources.[213] The courts also reacted to the difficulties of dealing with issues of custom by developing a rule as to the burden of proof. Where there was a dispute as to the existence or effect of local custom, custom became a mixed question of law and fact, and the party relying on it had the burden of proving it.[214] Thus, the courts could abstain from ruling definitively as to a customary law in dispute, and simply hold that the party had failed to bear his burden of proof.[215]

1. *The Introduction And Incorporation Of American Legal Concepts.* The TT High Court opinions are marked by a continuous pattern of introducing and integrating American jurisprudential concepts with customary law. This phenomenon was manifested in four distinct ways. First, it most commonly resulted from the American Judge analogizing an asserted principle of custom to a familiar American legal concept. Thus, the Court drew upon the American law regarding non-interference in the internal affairs of associations and clubs as collateral support for the custom of permitting a Palauan clan wide discretion in the management and dis-

211. ANN. REPORT 1970, *supra* note 2, at 63; *see also* Oneitam v. Suain, 4 T.T.R. 62 (Tr. Div. Truck 1968) (Delving into the past of a culture with unrecorded history requires reliance on legend and love interpreted in accordance with the predilictions of the parties.).

212. As one source indicated, "for over 30 years, custom in the Marshalls has been whatever Kabua Kabua and Leonard Mason said it was."

213. 7 TTC § 2 (1980). This approach was not without its drawbacks. The anthropologists encountered the possibility of losing objectivity by becoming involved in the maelstrom of local politics. *See* Mason, *supra* note 195, at 50. More importantly, Micronesians may have resented Americans acting as arbiters of Micronesian culture, because no American could understand or represent the Micronesian culture to the extent a Micronesian could. *Id.* at 51.

214. Kenyul v. Tamangin, 2 T.T.R. 648 (App. Div. 1964).

215. Basilius v. Rengiil, 2 T.T.R. 430 (Tr. Div. Palau 1963).

tributions of its assets.[216] Similarly, an analogy to the immunity of a judge from suit based on a judicial decision was drawn upon to support the denial of a claim against an Iorij lablab (paramount chief) based on his determination of disputed alab (headman) rights.[217] The Court also used analogies to conditional gifts[218] and lands held in trust[219] to resolve land disputes.

Second, the Court introduced American legal concepts, not by way of analogy, but as separate justifications for the decisions, apart from, but reaching the same results as, the customary law. In this manner, the Court held certain land transfers invalid, not only as contrary to custom, but also for lack of consideration.[220] Alternatively, transfers were upheld, in addition to customary considerations, because they involved good faith purchasers for value.[221] Laches[222] and estoppel[223] were also used as alternative support for court discussions. An interesting case is *Risong v. Iderrech*,[224] in which the Court diligently analyzed the memberships of two Palauan clans which had merged to a certain extent, and the customary rights of senior ochel (in the matrilineal line) clan members as against senior ulechel (in the patrilineal line) clan members to reach a result that also happened to comport with the wishes of a majority of clan members, a fact the court noted as an afterthought.

Third, the Court made a very straight-forward injection of American concepts into customary questions, resulting in modification of custom. In a number of cases in Palau, the court explicitly recognized that the notion of individual ownership of land was a foreign concept that originally had no place in Palau customary land law, yet integrated the concept into the customary law.[225] In like manner, in the Marshall Islands, the Court imposed upon the Iroij Lablabs (paramount chiefs) a duty to proceed with due process of law in determining the rights of subordinate land-holders.[226] Additionally, the concept of laches was injected into customary land disputes as a means of creating a presumption that land had been

216. Lalou v. Aliang, 1 T.T.R. 290 (Tr. Div. Palau 1955).

217. Rilometo v. Lanlobar, 4 T.T.R. 172 (Tr. Div. Marshall Islands 1968).

218. Imeong v. Ebau, 3 T.T.R. 144 (Tr. Div. Palau 1966); Sonten v. Epel, 2 T.T.R. 215 (Tr. Div. Ponape 1961); Ens v. Alisina, 2 T.T.R. 362 (Tr. Div. Ponape 1962).

219. In Re Estate of Faisao, 4 T.T.R. 92 (Tr. Div. Mariana Islands 1968).

220. Kisaol v. Gibbons, 1 T.T.R. 597 (App. Div. 1956).

221. Asanuma v. Pius, 1 T.T.R. 458 (Tr. Div. Palau 1958); Armaluuk v. Orrukem, 4 T.T.R. 474 (Tr. Div. Palau 1969); Ngirkelau v. Trust Territory, 1 T.T.R. 543 (Tr. Div. Palau 1958).

222. Mworkin v. Sairenios, 4 T.T.R. 87 (Tr. Div. Ponape 1968).

223. Ngirkelau v. Trust Territory, 1 T.T.R. 543 (Tr. Div. Palau 1958).

224. 4 T.T.R. 459 (Tr. Div. Palau 1969).

225. Ngiruhelbad v. Merii, 1 T.T.R. 367 (Tr. Div. Palau 1958), *aff'd*, 2 T.T.R. 631 (App. Div. 1961); Orrukem v. Kikuch, 2 T.T.R. 533 (Tr. Div. Palau 1964).

226. Abija v. Larbit, 1 T.T.R. 382 (Tr. Div. Marshall Islands 1958); Amon v. Lokanwa, 6 T.T.R. 413 (Tr. Div. Marshall Islands 1974).

given with, or without, customary reversionary interests.[227] Other examples of American concepts which the court incorporated into custom are rescission,[228] restitution,[229] and merger of estates.[230]

Fourth, the Court sometimes utilized American legal concepts to override customary law. This occurred most frequently when parties sought to upset long-standing land rights and the Court applied laches, adverse possession, a presumption of ownership, or a combination thereof, to obviate the need to inquire into the parties' customary rights.[231] Other concepts utilized to override custom, or preclude raising a claim based on custom, were estoppel,[232] res judicata or finality of judgments,[233] and the statute of limitations.[234]

Finally, in certain instances, the Court adopted American common law concepts without reference to customary law, or even adverting to the possibility that custom may have had some application. Admittedly, some cases of this character arose in the Mariana Islands, where long exposure to foreign domination substantially had erased customary law.[235] Curiously, other cases of this type involved interests in land, the subject around which most customary law revolves, in Truk, one of the most traditional districts of the TT.[236] By way of contrast, in some cases, the Court explicitly determined that no clearly established custom existed to cover a given situation before it applied American common law. In *Ychitaro v. Lotius*,[237] the Court made such a determination before adopting the American common law of negligence and finding a cause of action for wrongful death.

2. *Customary Land Tenure Law As Evolving Toward Individual Ownership*. The vast majority of cases involving customary issues arose in the context of land disputes. Because land is so scarce

227. Oneitam v. Suain, 4 T.T.R. 62 (Tr. Div. Truk 1968); Kio v. Puesi, 6 T.T.R. 12 (Tr. Div. Truk 1972).

228. Lasama v. Eunpenseun, 1 T.T.R. 249 (Tr. Div. Ponape 1955).

229. Ualag v. Itpik, 1 T.T.R. 288 (Tr. Div. Yap 1955).

230. Kehler v. Kehler, 1 T.T.R. 398 (Tr. Div. Ponape 1958).

231. Wena v. Maddison, 4 T.T.R. 194 (Tr. Div. Marshall Islands 1968); Elisa v. Kejerak, 1 T.T.R. 121 (Tr. Div. Marshall Islands 1958); Rochunap v. Yosochune, 2 T.T.R. 16 (Tr. Div. Truk 1968); Kanser v. Pitor, 2 T.T.R. 481 (Tr. Div. Truk 1963); Isebong v. Sadang, 1 T.T.R. 365 (Tr. Div. Palau 1958).

232. Akos v. Orem, 3 T.T.R. 504 (Tr. Div. Truk 1968).

233. Rudimch v. Chin, 3 T.T.R. 323 (Tr. Div. Palau 1967).

234. Butirang v. Uchel, 3 T.T.R. 382 (Tr. Div. Palau 1967), in which the court raised the defense of the statute of limitations on its own motion. The Court had a statutory basis for applying the statute of limitations. *See* TTC § 316 (1952 ed.).

235. Alig v. Trust Territory, 3 T.T.R. 603 (App. Div. 1967) (applying doctrine of sovereign immunity); Trust Territory v. Saipan Business Co., 3 T.T.R. 76 (Tr. Div. Mariana Islands 1965) (applying concepts of fraud and contracts).

236. Kanoten v. Manuel, 2 T.T.R. 3 (Tr. Div. Truk 1959) (intervivos gift); Naoro v. Inekis, 2 T.T.R. 232 (Tr. Div. Truk 1961) (sale of land).

237. 3 T.T.R. 3 (Tr. Div. Truk 1965).

in the TTPI, it has long been one of the most precious things in life to the Micronesians. Through the centuries, a vast and complex system of customary land tenure developed and, in some areas, land acquired an almost sacred character.[238] There is a mystical attachment to land that goes far beyond the individual. Land belongs to a lineage, to the dead, the living, the yet unborn.[239]

The High Commissioner recognized the supreme importance of land in the TTPI, and restricted ownership of land to citizens of the TTPI,[240] in order to prevent exploitation of the Micronesians.[241] Nonetheless, the Administration observed that traditional land tenure patterns created obstacles to land development and tended to discourage investment in land improvement.[242] Because many individuals possessed "interests" of some sort in a given parcel of land, terminating or executing a lease of traditionally held land required the concurrence and joinder of a large number of parties.[243] Transfers made without the consent of all required individuals were subject to being set aside by the Court.[244]

An independent report recommended land reform as the only ultimate solution.[245] Accordingly, the TT government adopted an express policy of encouraging ways and means to promote understanding of the need for a single consistent system of land holding in the TTPI.[246] By the end of the 1970's, the Administration believed that the rapid social and cultural changes that had been set in motion would result in changing the traditional land use practices.[247]

Trends consistent with the above policy are discernable in the decisions of the TT High Court. Whether the decisions reflect a conscious policy pursued by the Court, or resulted from a gradual adoption of introduced American legal concepts[248] and the Justices'

238. *See* LAND TENURE PATTERNS, *supra* note 195.

239. Nevin, *supra* note 4, at 55.

240. 1 TTC § 105 (1980). This section did not operate to divest non-citizens or their heirs and devisees of land interests held prior to December 8, 1941.

241. The court developed an interesting rule of application of this statute to prevent unjust results where the danger of exploitation was not present. Only the TT government could assert the statute against a land holder, and, as against all others, that individual was entitled to ownership until the government acted. Acfalle v. Aguon, 2 T.T.R. 133 (Tr. Div. Yap 1960) (Micronesian land-owner had become U.S. Citizen); Caipot v. Narruhn, 3 T.T.R. 18 (Tr. Div. Truk 1965) (Japanese national acquired land in 1938 and transferred it to his half Trukese daughter); Osawa v. Ludwig, 3 T.T.R. 594 (App. Div. 1966).

242. ANN. REPORT 1969, *supra* note 2, at 54.

243. *See* "Iroij Lablab" Mo Jitian v. Acme Importers, 7 T.T.R. 95 (Tr. Div. Marshall Islands 1974).

244. Ladrik v. Jakeo, 6 T.T.R. 389 (Tr. Div. Marshall Islands 1973).

245. Robert R. Nathan Associates, Inc., Economic Development Plan for Micronesia (Dec. 1966).

246. ANN. REPORT 1969, *supra* note 2, at 54.

247. ANN. REPORT 1979, *supra* note 2, at 42.

248. *See supra* text accompanying notes 216-37.

natural affinity for the Western concept of individual ownership is open to conjecture.

Occasionally the Court frankly acknowledged the policy behind its decision:

> Individual land was a foreign concept that had no place originally in Palau customary land law. It is clear that the very purpose of introducing this land concept was to get away from the complications and limitations of the Palauan matrilineal clan and lineage system and to permit individual control of land and patrilineal inheritance of it.[249]

The Court obviously viewed custom in general, and land tenure in particular, as evolving toward familiar Western patterns. In addition to upholding the introduced concept of individual ownership of land in Palau, the Court generally declined to undo changes in land tenure made by previous administrations. Thus, the provisions controlling transfer and inheritance of land set forth in the title documents issued by the German Administration on Ponape Island were almost universally held to control over custom.[250]

Commonly in Palau, and to a lesser extent in other districts, the Japanese Administration had a significant and lasting impact on land tenure. Japanese officials surveyed the land and made written determinations as to how title was held. The TT High Court applied a strong presumption to the correctness of the Japanese survey determinations. The presumption was rarely overcome, especially when the survey listed the land as individually held and the opposing claim was that of a clan.[251] On occasion, the presumption was overcome in favor of a clan,[252] or the presumption supported the clan's claim against an individual, and was upheld.[253] However, most cases in which the presumption was overcome did not involve the claims of individuals against those of clans.[254]

The Court's disinclination to attempt to reestablish customs changed by the previous powers also manifested itself in the use of the "ancient wrongs" doctrine. The doctrine holds that a successor colonial power is under no obligation to correct the acts of the previous colonial power, even assuming those acts constituted

249. Ngiruhelbad v. Merii, 1 T.T.R. 367 (Tr. Dir. Palau 1958).

250. *See infra* notes 297-324 and accompanying text.

251. Elechus v. Kedesau, 4 T.T.R. 444 (Tr. Div. Palau 1969); Osima v. Rengiil, 2 T.T.R. 151 (Tr. Div. Palau 1960); Ngiruhelbad v. Merii, 2 T.T.R. 631 (App. Div. 1961); Ngesengaol v. Torual, 2 T.T.R. 275 (Tr. Div. Palau 1961).

252. Louch v. Mengelil, 2 T.T.R. 121 (Tr. Div. Palau 1960).

253. Ucherbelau v. Ngirakerkeriil, 2 T.T.R. 283 (Tr. Div. Palau 1961).

254. Tabelual v. Magistrate Omelau, 2 T.T.R. 540 (Tr. Div. Palau 1964) (lineage against community); Henry v. Eluel, 5 T.T.R. 58 (Tr. Div. Ponape 1970) (question as to proper boundaries); Jesse v. Ebream, 1 T.T.R. 77 (Tr. Div. Ponape 1953) (individual against individual); Baab v. Klerang, 1 T.T.R. 77 (Tr. Div. Palau 1955) (claims of Japanese national).

"wrongs."[255] In cases involving the land rights of private parties established or ratified by the German[256] or Japanese[257] administrations, the Court applied the "ancient wrongs" doctrine to leave the disposition made by the prior power undisturbed, regardless of whether or not it ran counter to custom. The doctrine was also applied to lands taken by the previous administrations, title to which had vested in the TT government or the TT Alien Property Custodian.[258] However, the Court developed an exception to the doctrine in cases of takings by predecessor governments, permitting the land to be returned to the individuals where there had been no opportunity to seek redress prior to World War II.[259]

The Court strengthened individual rights in land in Truk as against the rights of the lineage in a subtle, and perhaps unintentional, way. In Truk district, it was common for a father to give lineage land to his children, who were known as "afokur" (issue of male members of a matrilineal lineage).[260] In early decisions, the Court recognized that such transfers were not absolute absent clear acquiescence by the lineage, and the lineage retained a reversionary interest in the land and the right to receive "first fruits" of the land.[261] In later cases, however, the Court presumed that a transfer to afokur was absolute unless reversionary interests were expressly attached.[262] The Court explained that the rights of afokur had changed during German and Japanese times, at least on the larger islands in Truk lagoon where foreign influence had been greatest.[263]

3. *Hostility Toward Some Aspects Of Customary Law.* While its forms vary, traditional social organization in Micronesia generally centers around "noble" and "commoner" lineages tracing descent matrilineally.[264] These complex class systems remain intact, to a greater degree in some areas than in others. Under the traditional social structure, the chiefs or kings possessed great power and

255. Christopher v. Trust Territory, 1 T.T.R. 150 (Tr. Div. Ponape 1954).

256. Wia v. Iosef, 1 T.T.R. 434 (Tr. Div. Truk 1958).

257. Isebong v. Sadang, 1 T.T.R. 365 (Tr. Div. Palau 1958); Ladore v. Salpatierre, 1 T.T.R. 18 (Tr. Div. Ponape 1952); Orijon v. Etjon, 1 T.T.R. 101 (Tr. Div. Ponape 1954). *But see* Arbedul v. Ngirturong, 1 T.T.P. 66 (Tr. Div. Palau 1953).

258. Christopher v. Trust Territory, 1 T.T.R. 150 (Tr. Div. Ponape 1954) (land taken by German government); Wasisang v. Trust Territory, 1 T.T.R. 14 (Tr. Div. Palau Dist. 1952) (land taken by Japanese administration); Oiterong v. Trust Territory, 1 T.T.R. 516 (Tr. Div. Palau 1958) (land taken by Japanese administration).

259. Moorou v. Trust Territory, 2 T.T.R. 124 (Tr. Div. Yap 1960); Santos v. Trust Territory, 1 T.T.R. 463 (Tr. Div. Palau 1958); Esebei v. Trust Territory, 1 T.T.R. 495 (Tr. Div. Palau 1958). *Cf.* Martin v. Trust Territory, 1 T.T.R. 481 (Tr. Div. Palau 1958).

260. LAND TENURE PATTERNS, *supra* note 195, at 172-176.

261. Nusia v. Sak, 1 T.T.R. 446 (Tr. Div. Truk 1958).

262. Kio v. Puesi, 6 T.T.R. 12 (Tr. Div. Truk 1972).

263. Poulis v. Meipel, 2 T.T.R. 245 (Tr. Div. Truk 1961).

264. ANN. REPORT, *supra* note 2, at 93.

ascended to their positions, at least in part, by virtue of genealogy. Such systems obviously conflict with American ideals and models of democratic government.[265]

Quite naturally, although the High Court Justices made monumental efforts to understand and faithfully apply customary law in most cases, there were occasions when the traditional result so offended American notions of fairness and equality that the Court contravened custom in order to achieve a more palatable result. In some instances, the policy reasons for overruling custom were compelling. In pre-contact Ponape, the traditional way of settling disputes as to who should succeed as Nanmwarki (high chief) of a given municipality was by waging war. The Court held that the suspension of the customary means in favor of elections was a valid exercise of power by the Administering Authority.[266]

In other cases, the Court did not have a justification as compelling as that of avoiding war, yet ameliorated a particularly harsh or seemingly unfair customary result. Thus, although the Court recognized the wide discretion with which Palauan clans may deal with their members, it denied clans the ability to cut off rights of clan members for the sole reason that they lived on another island,[267] and the ability to unfairly discontinue paying certain clan members their shares of mining royalty payments.[268]

The Court in particular manifested hostility toward the idea that a breach of some customary duty operated to divest the offending party of an interest in land. In *Imeong v. Ebau*,[269] where the breach of customary duties operated to revoke a gift of use rights, the Court imposed the requirement that the divested party be allowed a reasonable time to either purchase the land or compensate for the breach. In another case, the Court rejected the argument that the failure of an owner of individual land to live up to his traditional obligations restored the land to the clan or lineage from which it had come.[270] Keeping in mind the difficulty in ascertaining what the custom was, the Court at times opted not to believe an asserted customary result, holding in the alternative that if such a custom in fact existed, public policy would forbid its enforcement. Such was the case in *Yangilemau v. Mahoburimalei*,[271] where the asserted violation of custom was the disclosure of incest by family

265. *See* Dahlquist, *Political Development at the Municipal Level: Kiti, Ponape*, in POLITICAL DEVELOPMENT IN MICRONESIA 190 (1974).

266. Trust Territory v. Benido, 1 T.T.R. 216 (Tr. Div. Ponape 1953).

267. Lalou v. Aliang, 1 T.T.R. 94 (Tr. Div. Palau 1954).

268. Lalou v. Aliang, 1 T.T.R. 290 (Tr. Div. Palau 1955).

269. 3 T.T.R. 144 (Tr. Div. Palau 1966).

270. Orrukem v. Kikuch, 2 T.T.R. 533 (Tr. Div. Palau 1964).

271. 1 T.T.R. 429 (Tr. Div. Palau 1958).

members.[272]

In cases where an individual had an alternative means of support, particularly where a wife could look to her family following the dissolution of her marriage, the Court, while somewhat uncomfortable with the idea that customary omissions or violations resulted in forfeiture of certain rights, allowed the customs to stand.[273] Although public policy might forbid the enforcement of custom, and although custom must comply with principles of equal protection, the Court held that the custom could apply in these situations.[274]

The Court most explicitly demonstrated its fundamental antagonism toward custom that ran counter to American democratic impulses in limiting the powers of the iroij lablab (paramount chiefs) in the Marshall Islands. Marshallese society is structured into four different groups holding interests in land. The lowest interest is that of the "dri jerbal," people having rights to live on, and harvest from, a given weto (parcel of land), usually members of an extended matrilineal commoner lineage. The next interest is that of the "alab," the individual in immediate charge of a given weto, and usually the head of the commoner lineage.[275] The next interest is that of the "iroij erik," or lesser chief, a member of a noble lineage and accountable for the weto under him (or her) to the iroij lablab.[276] The highest interest in the system is the "iroij lablab," sometimes called "iroij elap," the paramount chief and head of a matrilineal noble lineage.[277] In pre-contact times, the iroij lablab possessed vast discretionary powers, in some instances power over life and death. Since land rights were often rearranged by means of warfare, the victorious iroij lablab possessed great latitude in assigning and reassigning land rights.[278] However, with the advent of foreign domination, warfare was banned and the powers of the iroij lablab diminished.

The TT High Court explicitly recognized that the imposition of foreign authority had reduced the power of the iroij lablab by requiring them to act within the limits of the foreign law.[279] The

272. The mitigation of harsh customary results was undoubtedly driven, in part, by the importance of land rights in Micronesia. In a subsistence society, people depend on the land for life, and the loss of land rights can be the equivalent of starvation. *See* Nevin, *supra* note 4, at 55.

273. *See* Giyal v. Guot, 4 T.T.R. 294 (Tr. Div. Yap 1969).

274. Ngiraroro v. Martin, 7 T.T.R. 310 (Tr. Div. Palau 1976).

275. The number of wetos varies with each alab. LAND TENURE PATTERNS, *supra* note 195, at 2-8.

276. Iroij erik were prevalent in the eastern chain (Ratak) of the Marshall Islands. In the western chain (Ralik), they were almost nonexistent. *Id.*

277. *Id.*

278. ANN. REPORT 1981, *supra* note 2, at 18-19.

279. Limine v. Lainej, 1 T.T.R. 107 (Tr. Div. Marshall Islands 1954).

Court repeatedly held that the iroij lablab could not cut off subordinate rights in land without "good reason."[280] "Good reason," however, did not include re-establishing rights that had been fixed following a civil war in the German period.[281] In one case, the leroij lablab (the female of iroij lablab) had taken away a newly-established alab's rights because the alab's predecessors had sided against the then iroij lablab during the civil war.[282] Although siding against the iroij lablab in war was usually grounds for forever divesting that branch of a lineage from land rights,[283] the Court did not find the custom to be sufficient grounds for divesting the present alab. Additionally, in cases where the leroij lablab had made a determination in favor of one claimant, the Court displayed little hesitation in reversing the leroij lablab if the Court found the other claimant's account of how the title had passed to be more consistent with the actual succession of the title.[284] In fact, in one case, the Court displaced the iroij lablab as the original decision-making authority in settling conflicting claims to alab rights.[285] In that case, the iroij lablab deferring to the Court was himself a District Court Judge,[286] so this was not a case of uninvited intrusion by the Court.

The most startling decision in this line is that of *Lebeiu v. Motlock*,[287] where an iroij lablab had removed the plaintiff and installed the defendant as alab in 1948. The two succeeding iroij lablab recognized the defendant as the alab upon their succession to the iroij lablab title. However, in 1973, the Court reversed the 25 year old decision and subsequent reaffirmations, and installed the plaintiff as alab because, in the Court's estimation, the plaintiff's genealogic claim to the title was stronger, and because no good cause was shown at trial for the action of the first iroij lablab. The decision is unusual in that it runs counter to the careful deference generally demonstrated by the Court in traditional title disputes,[288] and attempts to reduce the flexible customary pattern of succession to a set of rigid rules based solely on genealogy. This case may be properly viewed as an aberration.

280. *Id.*; Labiliet v. Zedekiah, 6 T.T.R. 571 (App. Div. 1974); Abija v. Larbit, 1 T.T.R. 382 (Tr. Div. Marshall Islands 1958). Usually the Court applied this limitation to a then recent action by a iroij lablab, *see* Lininono v. Nako, 4 T.T.R. 483 (App. Div. 1968), or leroij lablab (the title when the position was occupied by a woman), but would leave actions taken by the iroij during the Japanese period undisturbed. *See* Anjetob v. Taklob, 4 T.T.R. 120 (Tr. Div. Marshall Islands 1968).

281. Langjo v. Neimoro, 4 T.T.R. 115 (Tr. Div. Marshall Islands 1968).

282. *Id.*

283. *Id.*

284. Likinono v. Nako, 3 T.T.R. 120 (Tr. Div. Marshall Islands 1966).

285. Korabb v. Nakap, 6 T.T.R. 137 (Tr. Div. Marshall Islands 1973).

286. Kabua Kabua, presiding District Court Judge 1953-1985.

287. 6 T.T.R. 145 (Tr. Div. Marshall Islands 1973).

288. *See infra* text accompanying notes 328-43.

4. *Inconvenient Customs.* The merger of newly created statutory law and centuries old customary law was, understandably, not without its rough spots. If possible, when enforcing a new ordinance, the Court sought to construe it as parallel to, or in accordance with, some customary practice. For example, in upholding a newly imposed curfew in Palau, the Court stretched to find that the curfew comported with a customary practice utilized in times of unrest to restrict people's movements at night.[289]

Custom usually gave way, however, when it came into direct conflict with the constitutional rights incorporated into the TT Code, or when it became an impediment to the functioning of the criminal prosecution system. An example of the former is the case of *Mesechol v. Trust Territory*[290] which involved a tax, payable in labor, imposed by a Palauan municipality. The Court overturned a conviction for tax evasion in the District Court because the tax was unconstitutional, notwithstanding that the tax had substantial unanimity and was in accordance with Micronesian thinking and local custom.

Other customs gave way when they interfered with criminal prosecutions. A common problem was created by the customary "forgiveness" of a transgressor by his victim, which appears to have been a feature of all Micronesian societies. Once the offending party was forgiven in accordance with customary practice, it was as if the offense had never occurred. This often caused prosecutors serious difficulties in that, as far as their complaining witness was concerned and would testify, the offense never happened. However, the Court uniformly held that, notwithstanding the resulting difficulties of proof and the problem of discouraging public cooperation with law enforcement, custom had to yield to the law.[291] Therefore, a customary forgiveness was not grounds for dismissal, and the prosecutor retained the discretion to prosecute. This position has been adopted by the FSM Supreme Court although, in the FSM, customary law is of equal importance, and not subordinate, to written law.[292]

Other customs that necessarily yielded to the new system of law enforcement were those asserted as defenses. In a prosecution for arson in Yap, the defendant unsuccessfully submitted that under Yapese custom, he held the right and duty to atone, or obtain revenge, for a prior homicide by killing the murderer, burning his house, or stealing his canoe.[293] A common defense, albeit a gener-

289. Ngirasmengesong v. Trust Territory, 1 T.T.R. 615 (App. Div. 1958).
290. 2 T.T.R. 84 (Tr. Div. Palau 1959).
291. Celis v. Aguon, 3 T.T.R. 237 (Tr. Div. Mariana Islands 1967); Trust Territory v. Lino, 6 T.T.R. 7 (Tr. Div. Marshall Islands 1972).
292. Federated States of Micronesia v. Mudong, 1 FSM Intrm. 135 (Ponape 1982).
293. Figir v. Trust Territory, 4 T.T.R. 368 (Tr. Div. Yap 1969).

ally unsuccessful one, asserted in larceny cases, was the custom of freely "borrowing" articles for the borrower's temporary use.[294] The custom was asserted as justification for the act or as proof of the absence of an intent to steal. Both approaches failed to move the Court.

An interesting way in which custom became inconvenient to the legal system was over-enthusiastic use of the TT Code provision permitting prosecution of purely customary violations.[295] Without some limitation, prosecutions under this provision could have swamped the TT court system. However, in 1959 the High Court overturned a conviction for "immoral allegation and vicious defiance," holding that not every failure to observe the nicest details of polite custom is a crime.[296]

C. The General Rule: Diligence And Deference

The general approach of the TT High Court to customary matters, notwithstanding the injection of American legal concepts, the predilection toward individual ownership, the hostility toward "unfair" traditional results, and the necessary overriding of custom for the efficacy of law enforcement, was one of great diligence and wise deference. The Court realized that it could not separate the people from their customs by judicial fiat, and did not attempt to do so. At the same time, customary practices had been irrevocably altered by foreign dominion and contact with foreign cultures, and the Court could not, even if it desired to do so, return the Micronesians to their "natural" state. For the most part, the Court diligently wrestled with sometimes complex and elusive customs to achieve the best understanding possible, yet deferred to the Micronesians in choosing which cultural aspects to retain and which aspects to modify or abandon, as Micronesian culture adapted to the modern world.

1. *Ponape.* A complex social system of titles exists on Ponape Island, with the majority of adult males holding title either in one of the two noble lines or in the line of commoners. The island itself is divided into five independent areas, each having two lines of chiefs headed by individuals called "Nanmwarki" and "Naniken," respectively.[297] In pre-contact time, all the land area of the Ponape Islands belonged to the Nanmwarkis of each area, and the people used the land only by consent of the Nanmwarki and his nobles.[298]

The German government radically altered the Ponapean land-

294. *See, e.g.*, Fanamthin v. Trust Territory, 1 T.T.R. 412 (Tr. Div. Yap 1958).
295. *See supra* note 203.
296. Sechelong v. Trust Territory, 2 T.T.R. 92 (Tr. Div. Palau 1959).
297. ANN. REPORT 1965, *supra* note 2, at 93.
298. *Id.* at 71.

holding system. The vast majority of litigation in Ponape involved German land title documents which had been issued to all landholders on Ponape Island by the German administration. The title documents contained provisions governing inheritance of the land which differed significantly from Ponapean custom.[299] Additionally, the documents prohibited transfers without the approval of the Nanmwarki and the German Governor, testamentary disposition, and the holding by women of title to land.

The TT High Court repeatedly held that the German title documents changed or superseded customary law, and that the provisions controlled over older customary practice,[300] almost without exception.[301] Moreover, the Court expressly refused to allow title holders to re-impose the customary scheme via a family agreement[302] or by written instructions,[303] holding that such agreements or instructions had no legal effect.

The Court recognized land transfers that had been approved, in accordance with the title document provision, by the Nanmwarki and the "Governor," with the latter role filled by Japanese government officials.[304] Transfers attempted without the requisite consent, including testamentary dispositions, were held invalid.[305] Because the American administration did not continue the practice of the Germans and Japanese of giving express approval to transfers approved by the Nanmwarki, cases arose wherein one party claimed title under a partially approved transfer, opposed by the individual in line to take under the inheritance provisions of the title document. Generally, the Court held that a transfer so approved vested title in the transferee good as against the world, pending action by the American administration.[306]

In some cases, the Court's holding that an attempted transfer

299. LAND TENURE PATTERNS, *supra* note 195, at 87-97.

300. Shoniber v. Shoniber, 5 T.T.R. 532 (App. Div. 1971) (custom preventing child from inheriting from natural father when the child has already inherited from adoptive parents held superseded); Souwelian v. Kadarina, 5 T.T.R. 14 (Tr. Div. Ponape 1970) (German title provisions prohibiting testimony disposition upheld); Kilara v. Alexander, 1 T.T.R. 3 (Ponape Dist. Ct. 1951).

301. *But see* Petiele v. Max, 1 T.T.R. 26 (Tr. Div. Ponape 1952) (custom that adopted children are considered legal children held to prevail over title provision that blood brother takes before adopted child).

302. Miako v. Losa, 1 T.T.R. 255 (Tr. Div. Ponape 1955).

303. Sarapina v. Eldridge, 1 T.T.R. 297 (Tr. Div. Ponape 1957).

304. Weirland v. Weirland, 1 T.T.R. 201 (Tr. Div. Ponape 1954); Kilement v. Eskalen, 1 T.T.R. 309 (Tr. Div. Ponape 1957); Pampilona v. Ponpeiso, 2 T.T.R. 59 (Tr. Div. Ponape 1959); Jonathan v. Jonathan, 6 T.T.R. 100 (Tr. Div. Ponape 1972).

305. Eneriko v. Marina, 1 T.T.R. 334 (Tr. Div. Ponape 1957); Kehler v. Kehler, 1 T.T.R. 398 (Tr. Div. Ponape 1958); Ladore v. Ladore, 1 T.T.R. 21 (Tr. Div. Ponape 1952).

306. Lusama v. Eunpeseun, 1 T.T.R. 249 (Tr. Div. Ponape 1955); Iosep v. Welianter, 1 T.T.R. 315 (Tr. Div. Ponape 1957).

was invalid created a vacancy in the title. Under the German land title documents, in the absence of heirs or an approved transfer, the Nanmwarki and the Governor determined the disposition of the property.[307] Faced with a vacancy in the legal title and competing claimants in court, the Court displayed an equitable flexibility. In one case, the Court confirmed a long-standing cooperative arrangement as to use rights and possession among the parties, pending action by the Nanmwarki and District Administrator.[308] In other cases, possession of the property was divided between the parties,[309] or confirmed in the "transferee" who had the better right to the land,[310] with a recommendation by the Court that the parties apply to the Nanmwarki and District Administrator for post hoc approval of the attempted transfers.

In 1957, the Ponape Island Congress passed resolutions which, upon approval by the High Commissioner, superseded much of the German land law.[311] Thus cases involving the German land title documents became rare after 1957.

A curious feature of the German land law was the prohibition against women owning land, which appears to be clearly contrary to Ponapean custom.[312] Although the Court recognized the fact that many German land title documents bore the name of a male simply because of the Germans' insistence that women could not own land, it generally upheld the German scheme.[313] The German prohibition against women inheriting land remained effective until 1957.[314] Attempts to circumvent the prohibition, by giving land to a male relative "in trust" for a woman, were held invalid as contrary to public policy.[315] Even in a case where a transfer to a woman had been approved by the Nanmwarki and the Japanese officials, who apparently did not take the German law very seriously,[316] the Court construed the transfer as only granting a life estate.[317]

The Germans issued the land title documents on Ponape Island itself, but not on the other islands and atolls of Ponape District. The Court generally recognized that German land law had no effect

307. LAND TENURE PATTERNS, *supra* note 195, at 88-89.

308. Lampert v. Julia, 1 T.T.R. 318 (Tr. Div. Ponape 1957).

309. Plus v. Pretrik, 1 T.T.R. 7 (Ponape Dist. Ct. 1951).

310. Godlieb v. Welten, 1 T.T.R. 175 (Tr. Div. Ponape 1954).

311. LAND TENURE PATTERNS, *supra* note 195, at 102-104.

312. *Id.* at 97-98, 101.

313. *See* Belimina v. Pelim, 1 T.T.R. 210 (Tr. Div. Ponape 1954). *But see* Miako v. Losa, 1 T.T.R. 255 (Tr. Div. Ponape 1955).

314. Diopulos v. Osaias, 4 T.T.R. 29 (Tr. Div. Ponape 1968).

315. Makdalena v. Ligor, 2 T.T.R. 572 (Tr. Div. Ponape 1964).

316. LAND TENURE PATTERNS, *supra* note 195, at 97.

317. Pampilona v. Ponpeiso, 2 T.T.R. 59 (Tr. Div. Ponape 1959).

on Pingelap,[318] Ngatik,[319] Kapingamarangi,[320] and Kusaie,[321] and applied the distinct local customary laws. An interesting judicial evolution in Pingelap land law occurred, similar to that regarding afokur rights in Truk.[322] In early cases, the Court recognized that gifts of land within a Pingelapese family were subject to readjustment should the needs of family members change[323] yet, in later cases, the Court held that the donee's individual land ownership rights were not subject to rearrangement.[324]

2. *Marshall Islands.* Because of its scarcity, land is of paramount importance to the Marshallese people. The primary agricultural product is copra and the land provides food for all members of Marshallese society.[325] A complex class system exists in the Marshall Islands with commoner and royal lineages producing a three or four-tiered land tenure system.[326] The iroij lablab retain substantial power and influence as they did throughout the American period.[327]

The High Court recognized the power and respect commanded by the iroij lablab and, although the Court limited the powers of the iroij by holding them to standards of due process[328] and "good reason,"[329] the Court generally upheld the iroij lablab as against subordinates attempting to throw off customary controls. The Court repeatedly held that an alab could not dispose of property, or rights therein, by will without the approval of the iroij lablab.[330] Additionally, alabs could not divide or give away alab rights[331] or cut off dri jerbal rights[332] without the approval of the iroij lablab. Moreover, the iroij lablab had the ultimate authority on the question of taking away alab rights, over both the iroij erik[333] and the atoll

318. Mwokin v. Sairenios, 4 T.T.R. 87 (Tr. Div. Ponape 1968).
319. Toter v. Iouanes, 1 T.T.R. 160 (Tr. Div. Ponape 1954).
320. Ciroit v. Pahingai, 3 T.T.R. 320 (Tr. Div. Ponape 1967).
321. Seku v. Fredie, 1 T.T.R. 82 (Tr. Div. Ponape 1953).
322. *See supra* text accompanying notes 260-63.
323. Kelemend v. Mak, 2 T.T.R. 55 (Tr. Div. Ponape 1959).
324. Pelipe v. Pelipe, 3 T.T.R. 133 (Tr. Div. Ponape 1966).
325. ANN. REPORT 1967, *supra* note 2, at 60.
326. *See supra* text accompanying notes 275-77.
327. Before the separation of the TTPI, the iroij lablab either formed a separate house of the Marshall Islands District Legislature or held certain reserved seats once the legislature became a unicameral body. ANN. REPORT 1958, *supra* note 2, at 18; ANN. REPORT 1969, *supra* note 2, at 19.
328. *See supra* note 226.
329. *See supra* note 280.
330. Lalik v. Elsen, 1 T.T.R. 134 (Tr. Div. Marshall Islands 1954); Limine v. Lainej, 1 T.T.R. 231 (Tr. Div. Marshall Islands 1955); Aman v. Langrine, 7 T.T.R. 65 (Tr. Div. Marshall Islands 1974).
331. James R. v. Albert Z., 2 T.T.R. 135 (Tr. Div. Marshall Islands 1960); Lazaruss v. Likjer, 1 T.T.R. 129 (Tr. Div. Marshall Islands 1954).
332. Taina v. Namo, 2 T.T.R. 41 (Tr. Div. Marshall Islands 1959).
333. Emoj v. James, 2 T.T.R. 48 (Tr. Div. Marshall Islands 1959).

council, an organization created by the American administration.[334]

The Court necessarily involved itself in determinations of iroij lablab succession, inasmuch as the traditional means of resolving an impasse by warfare was suspended by the foreign authorities. The two requirements for succession to an iroij lablab title are that a claimant must be in the proper class of those entitled by genealogy to succeed, and must be recognized and accepted as the iroij lablab by the other persons having rights in the land (dri jerbal, alab, and iroij erik).[335] Inheritance is basically matrilineal, the title progressing chronologically through the siblings of one generation before passing to the children of the eldest sister.[336] The requirement of recognition and acceptance is the product of the rights and obligations running both up and down the chain of those holding rights in the land, from dri jerbal to iroij lablab and from iroij lablab to dri jerbal. If the people do not accept a particular individual as iroij lablab, he does not become iroij lablab.[337]

The Court recognized the importance of the acceptance requirement; a decree establishing an iroij lablab not accepted by the people would have been an ineffective act. The requirement was applied in situations where the proper succession by genealogy was unclear.[338]

The Court consistently followed its initial holding that it would not declare a claimant as iroij lablab in the absence of recognition and acceptance by the people.[339] The Appellate Division in *Bina v. Lajoun*, held that even if the people's opposition to a claimant was contrary to custom, the Court should not attempt to install the claimant as iroij lablab in the face of such opposition.[340] This extremely deferential position was not always followed.[341] The only aberration is the case of *Jetnil v. Buonmar*,[342] in which the court declared the sister of the deceased iroij lablab to be the title-holder

334. Ejkel v. Kon, 2 T.T.R. 44 (Tr. Div. Marshall Islands 1959).

335. Labina v. Lainej, 4 T.T.R. 234 (Tr. Div. Marshall Islands 1969).

336. LAND TENURE PATTERNS, *supra* note 195, at 16-19.

337. A fact illuminating this principle is that the word for commoner, "kajur", also means "power". *Id.* at 5.

338. In the Arno Atoll cases, there had been no iroij lablab on one-half of Arno for over twenty years until one individual, Jiwirak, began gathering popular support. The Court held that alabs could recognize Jiwirak over the opposition of their iroij erik, *see* Abijai v. Jiwiak T., 1 T.T.R. 389 (Tr. Div. Marshall Islands 1958). However, the Court further held that Jiwiak could not assert power over those iroij erik and alabs who had not recognized him, *see* Liwinrak v. Jiwirak T., 1 T.T.R. 394 (Tr. Div. Marshall Islands 1958). *See also* Liabon v. Namilur, 2 T.T.R. 52 (Tr. Div. Marshall Islands 1959); Lainlij v. Lajoun, 1 T.T.R. 113 (Tr. Div. Marshall Islands 1954) (when an individual gives his support to the iroij, he cannot withdraw his support without good cause).

339. Labina v. Lainej, 4 T.T.R. 234 (Tr. Div. Marshall Islands 1969).

340. Bina v. Lajoun, 5 T.T.R. 366 (App. Div. 1971).

341. Jitiam v. Litabtok, 5 T.T.R. 513 (Tr. Div. Marshall Islands 1971).

342. 4 T.T.R. 420 (Tr. Div. Marshall Islands 1969).

over the competing claims of the sons of the iroij lablab, without reference to the acceptance issue.[343]

The High Court did actively resolve a question of iroij succession in a case that apparently involved the opposition of the Nitijela, as opposed to that of subordinate right-holders. A High Court Justice ordered the Nitijela to seat Iroij Anjua Leoak. When his order was ignored, he declared all acts of the Nitijela null and void, and froze the Nitijela's funds.[344] The Nitijela relented and seated the iroij.[345]

Whether the Courts of the RepMar will follow the extremely deferential holding of the TT High Court in *Bina v. Lajoun*,[346] or undertake to establish a claimant as iroij lablab without popular support, remains to be seen. A dispute between rival claimants to an iroij lablab title is currently pending before the High Court of the RepMar which may answer this question.[347]

The High Court's reluctance to "undo" the acts of the previous administration[348] manifested itself in a series of cases involving Marshallese succession that ultimately created a confused and unworkable situation. In 1926, a Japanese official removed the iroij lablab of one half of Majuro Atoll (Jebrik's side)[349] and, eventually, the Japanese government functioned as iroij lablab. Early in the American period, the High Court held that the Japanese action, although a clear departure from custom, was controlling.[350] The American government, however, declined to act as iroij lablab. Such refusal, together with the Court's holding[351] that the iroij lablab rights were vested collectively in the iroij erik and the "droulul,"[352] caused great confusion by necessitating the concurrence of the entire droulul to exercise the iroij lablab authority. Moreover, the Court, at least initially, did not recognize a represen-

343. *See* Rynkiewich, *The Ossification of Local Politics: The Impact of Colonialism on a Marshall Islands Atoll*, in POLITICAL DEVELOPMENT IN MICRONESIA 159-160 (D. Hughes and S. Lingenfelter eds. 1974).

344. ESG Notes, *supra* note 33, April 9, 1979, at 4.

345. This case is objectionable because it not only represents an American judge vesting someone with a customary title over the objects of Marshallese, but also appears to be an egregious case of judicial over-reaching to interfere with the legislative branch of government.

346. *See supra* note 340.

347. Kabua Kabua v. Imada Kabua, RepMar High Court Civil Action No. 1984-98.

348. *See supra* text accompanying notes 255-59.

349. J. TOBIN, AN INVESTIGATION OF THE SOCIO-POLITICAL SCHISM ON MAJURO ATOLL 2-8 (1953).

350. Levi v. Kumtak, 1 T.T.R. 36 (Tr. Div. Marshall Islands 1953); Lazarus S. v. Tomijwa, 1 T.T.R. 123 (Tr. Div. Marshall Islands 1954); Jatios v. Levi, 1 T.T.R. 578 (App. Div. 1954).

351. Joab J. Labwoj, 2 T.T.R. 172 (Tr. Div. Marshall Islands 1961).

352. The droulul was a group consisting of all persons holding rights in land on Jebrik's side. *Id.*

tative committee as having that authority.[353] Nonetheless, alabs and iroij erik on Jebrik's Side were obliged to cooperate with the droulul[354] and could not reject its authority.[355] Eventually, because the situation became so unworkable, the Court found itself approving successors to subordinate titles.[356] On one occasion, the Court cut off alab rights for refusal to recognize an iroij erik established by a previous Court decision.[357] For once, the Court's preference to leave matters alone led it into more difficulty than it avoided.

3. *Palau.* In ancient Palau, land was divided into public domain and clan land. Uninhabitable lands in the interior of Babelthuap Island, mangrove swamps, and reefs were public domain. Clan lands were those with utility value and, for the most part, were assigned to male lineage heads who, in turn, assigned parcels to male lineage members.[358] The social structure centered around hamlets which were ruled by two councils, one of male chiefs and one of titled females. Palauan hamlets were loosely linked into village clusters, which constituted the municipalities under the TT structure and today form the states of Palau. Traditionally, the village clusters were linked to make up two great semi-states, north and south, each headed by a high chief.[359]

Although the system of titles within Palauan clans and the internal workings of the clans appear very complex, the High Court, on occasion, would undertake to settle title disputes with the familiar justification that the clans had to operate within the limits of the law and could not settle their differences by traditional violent means.[360] The Court, although it had the authority to review both questions of law and fact, generally upheld the decisions of Palauan District Court Judges in cases involving title disputes.[361] Where possible, the Court used its coercive powers to bring the parties together to settle the matter on their own.[362]

Another area of great customary importance that the Court handled with admirable sensitivity was the matter of chief's title land. Chief's title land is of tremendous importance to the lineage,[363] and the Court, in contrast to its usual preference for individ-

353. Lojob v. Albert, 2 T.T.R. 339 (Tr. Div. Marshall Islands 1962).
354. Lanki v. Lanikieo, 7 T.T.R. 533 (App. Div. 1977).
355. Amon v. Lakanwa, 6 T.T.R. 413 (Tr. Div. Marshall Islands 1974).
356. Klena v. Madison, 4 T.T.R. 194 (Tr. Div. Marshall Islands 1968).
357. Joab J. v. Labwoj, 3 T.T.R. 72 (Tr. Div. Marshall Islands 1965).
358. ANN. REPORT 1965, *supra* note 2, at 70.
359. *Id.* at 94.
360. Delemel v. Tulop, 3 T.T.R. 469 (Tr. Div. Palau 1968).
361. Ngiraiechol v. Inglai Clan, 3 T.T.R. 525 (Tr. Div. Palau 1968); Ngertelwang Clan v. Sechelong, 6 T.T.R. 323 (Tr. Div. Palau 1973).
362. Delemel v. Tulop, *supra* note 360.
363. Kisaol v. Gibbons, 1 T.T.R. 597 (App. Div. 1956).

ual ownership, consistently held that chief's title land could not be transferred without the concurrence of all adult lineage members.[364] Because chief's title land is a symbol of clan unity and existence, the Court recognized situations where other land could take on the character of chief's title land,[365] thus giving the clan reversionary interests in the land.

In matters of domestic relations, the Court generally declined to make customary determinations.[366] In the arrangements for olmesumech, traditional payments following dissolution of marriage, made at the meeting of the spouses' relatives were not subject to judicial review.[367] Even after the TT Code made provision for court divorces, the Court would not interfere with, or determine on its own, the payment of olmesumech.[368] The Court also followed Palauan custom relating to child and spousal support following divorce,[369] and adoptions[370] that ran counter to the law in most American jurisdictions. However, the Court did apply American law, rather than Palauan custom, to determine entitlement to death benefits of government employees.[371]

4. *Truk.* Due to high population density, land is more precious in Truk than anywhere else in the TTPI. Land may be owned individually or by family lineage groups, and improvements[372] may be owned separately from the land. Usually, an individual in Truk has some, but not necessarily sole, interest in a number of plots of land.[373] Trukese land tenure is complex and varies among the subareas in the former district.[374] There are both matrilineal and patrilineal lineages and children might receive an interest in lineage land from their father's lineage, their mother's lineage, or both.[375]

The complexity of land questions in Truk may have deterred the High Court in *Santer v. Onita*; rather than ruling in the case, the

364. Gibbons v. Bismark, 1 T.T.R. 372 (Tr. Div. Palau 1958); Gibbons v. Kosaol, 1 T.T.R. 219 (Tr. Div. Palau 1955).

365. Dudiu v. Ngiraikelau, 1 T.T.R. 504 (Tr. Div. Palau 1958).

366. *See* Tmetuchl v. Western Carolines Trading Co., 4 T.T.R. 395 (Tr. Div. Palau 1969).

367. Ngirngerak v. Ngirangeang, 2 T.T.R. 182 (Tr. Div. Palau 1961); Ngeskesuk v. Moleul, 2 T.T.R. 188 (Tr. Div. Palau 1961).

368. Ikeda v. Ngirachelbaed, 5 T.T.R. 204 (Tr. Div. Palau 1970); Itelbang v. Gabrina, 2 T.T.R. 194 (Tr. Div. Palau 1961).

369. Orak v. Ngiraukloi, 1 T.T.R. 454 (Tr. Div. Palau 1958); Ngirararoro v. Martin, 7 T.T.R. 310 (Tr. Div. Palau 1976).

370. Olekeriil v. Basilius, 2 T.T.R. 198 (Tr. Div. Palau 1961).

371. Joshua v. Joshua, 3 T.T.R. 212 (Tr. Div. Palau 1966).

372. For example, fruit bearing trees which could be cultivated were considered improvements owned separately from the land.

373. ANN. REPORT 1965, *supra* note 2, at 71.

374. LAND TENURE PATTERNS, *supra* note 195, at 162.

375. *Id.* at 167.

Court gave the parties three months to work out their differences.[376] The Court did not have the benefit of Western concepts introduced by previous administrations in Truk as it did elsewhere. Although the Germans had issued title documents in Truk, as they had in Ponape,[377] these documents had little impact on Trukese land law.[378]

When the Court decided issues of land title, it generally recognized the rights of lineages in lineage land,[379] especially where the lineage had not consented to a gift of the land.[380] Similarly, the Court acknowledged that the owner of individual land or family land (as distinct from lineage land) could not transfer it without the consent of his children,[381] although it was very receptive to suggestions of exceptions to this customary rule.[382]

As in Palau,[383] the Court showed greater deference to custom in the area of domestic relations. Under Trukese custom, either spouse may dissolve the marriage without any action by someone in authority by simply "throwing away" the other spouse.[384] The Court gave full effect to this custom and overturned convictions in the District Court for bigamy and adultery.[385]

5. *Yap.* In Yap, the traditional unit of land is the "tabinaw," or estate, consisting of all land belonging to a single extended household.[386] Social stratification reached a peak in Yap with nine different social classes, outer islanders being relegated to a subordinate status.[387] Yap remains the least "westernized" of the former districts.

The High Court expressly acknowledged that American land concepts simply were not competent to deal with the complex tabinaw or family interests in land.[388] As it had in Truk,[389] the Court avoided ruling in land disputes, attempting instead to get the parties to work out some cooperative arrangement.[390] The Court

376. 1 T.T.R. 439 (Tr. Div. Truk 1958).
377. *See supra* note 299 and accompanying text.
378. Resenam v. Nopuo, 5 T.T.R. 248 (Tr. Div. Truk 1970).
379. Joseph v. Onesi, 2 T.T.R. 435 (Tr. Div. Truk 1963).
380. Nitoka v. Nesepuer, 2 T.T.R. 12 (Tr. Div. Truk 1959).
381. Resenam v. Nopuo, 5 T.T.R. 248 (Tr. Div. Truk 1970).
382. Poulis v. Meipel, 2 T.T.R. 245 (Tr. Div. Truk 1961); Rieuo v. Nochi, 2 T.T.R. 291 (Tr. Div. Truk 1961); Irons v. Mailo, 3 T.T.R. 194 (Tr. Div. Truk 1966).
383. *See supra* notes 366-70 and accompanying text.
384. Purako v. Efou, 1 T.T.R. 236 (Tr. Div. Truk 1955).
385. *Id.*; Lornis v. Trust Territory, 2 T.T.R. 114 (Tr. Div. Truk 1959).
386. ANN. REPORT 1965, *supra* note 2, at 70.
387. *Id.* at 95.
388. Giyal v. Guot, 4 T.T.R. 294 (Tr. Div. Yap 1969).
389. *See supra* note 376 and accompanying text.
390. Duguwen v. Dognedl, 1 T.T.R. 223 (Tr. Div. Yap 1955).

benefited from the fact that comparatively few land disputes were litigated in Yap.

When it dealt with land disputes, the Court demonstrated no reluctance in upholding the ownership rights of clans in land,[391] despite its general predilection to favor individual land ownership. Additionally, although the complex non-possessory "mafen" rights (the right to ultimate possession) persisted over generations and created serious restraints on the alienability of land, the Court recognized and gave effect to such rights.[392] "Mafen" rights were especially difficult to deal with as they descended in the matrilineal line, while possession and use rights in land descended patrilineally.[393]

6. *Mariana Islands.* The traditional land tenure system of the Chamorros began to break down when the Spanish administration gave Chamorro families rights to certain lands on the islands. By the American period, a Western system with individual ownership and free alienability was well established.[394] Additionally, the traditional social class structure of nobles and commoners had been completely displaced by a Western family structure.[395] Therefore, relatively few issues of customary law arose in the Mariana Islands. Determining Chamorro customary rights when such issues were raised was very difficult because of the tendency over the years to "read in" foreign concepts such as community property.[396]

One customary concept to which the Court gave effect was that of "partido" or "partida,"[397] the division of land by a father at a family meeting to take effect at his death.[398] A definitely non-Western custom given effect in the Marianas, and in other former districts was that a man's children take ahead of his widow.[399] The selection of this customary law for universal deference by the Court is an interesting one, given its activism in other areas.

VI. CONCLUSION

Analysis of the United States legal legacy produces two general observations. First, the United States has transferred its governmental structure, including its court system, to societies with profoundly different cultural heritages.[400] Although this transfer has

391. Filimew v. Pong, 1 T.T.R. 11 (Yap Dist. Ct. 1951).
392. Moolang v. Toruuan, 3 T.T.R. 219 (Tr. Div. Yap 1966).
393. *Id.*
394. ANN. REPORT 1965, *supra* note 2, at 71.
395. *Id.* at 94.
396. Blas v. Blas, 3 T.T.R. 99 (Tr. Div. Marianas 1966).
397. *Id.*
398. Muna v. Muna, 7 T.T.R. 632 (App. Div. 1978).
399. In Re Guerrero, 3 T.T.R. 546 (Tr. Div. Marianas 1968).
400. The American model of three separate branches of government—executive,

been criticized, the new Micronesian states have uniformly adopted the legal system established by the United States in their constitutions.[401] These choices were made in the context of Micronesian participation in the system generally limited to the judiciary of, and non-lawyer advocacy before, the lower courts.[402] The relative lack of experience with the TT High Court, and the alacrity with which the constitutions of the new states were drafted, suggest that the adoption of the American system resulted from a lack of realistic alternatives rather than a wholehearted commitment to the existing system.

On the other hand, the Micronesians apparently view themselves as well served by the American judicial structure.[403] They have utilized the legal system as an effective means of furthering their interests,[404] and have sought judicial relief in somewhat unorthodox cases.[405] The courts of the new Micronesian states, although still largely staffed by Americans, have asserted their independence from United States precedent, including decisions of the TT High Court.[406] Additionally, the FSM Supreme Court has urged the acquisition of case reports from other Pacific jurisdictions.[407] While justifiable concerns exist in Micronesia regarding the viability and durability of American created political institu-

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legislative, and judicial—is somewhat at odds with Micronesian culture, where traditional leaders performed all three functions. *See* Meller, *supra* note 6, at 268; *see also* Gumb, *Quiet Desperation: An Essay on Palau and the Superport*, 1 MICRONESIAN PERSP., Apr. 1978, at 3 [hereinafter cited as Gumb].

401. *See supra* text at 19-25 and accompanying footnotes.

402. A Micronesian did not sit on the TT High Court until 1977 when Mamoru Nakamura, now Chief Justice of the Supreme Court of Palau, was appointed Associate Justice. ANN. REPORT 1977, *supra* note 2, at 134. By 1975, there were only thirteen Micronesians with American law degrees practicing in the TTPI. ANN. REPORT 1975, *supra* note 2, at 117. Additionally, the TT legal system has been characterized as a "complex legal web" with which the Micronesians were totally unfamiliar. Goodman & Moos, *supra* note 9, at 74-75.

403. HEINE, *supra* note 133, at 85.

404. For example, the people of Enewetak brought suit in the early 1970's to halt the Pacific Atoll Cratering Experiments (PACE) program. Kiste, *The People of Enewetak: Past and Present*, 1 MICRONESIAN PERSP., Nov. 1977, at 21-22. More recently, the Micronesians have shown little hesitancy in suing their new governments. *See, e.g.*, Marianas Variety News & Views, Sept. 12, 1980, at 3; *see also* Marianas Variety News & Views, Oct. 17, 1980, at 3.

405. ESG Notes, *supra* note 33, June 21, 1978, at 4 (suit filed seeking injunction against appropriation of funds for the referendum on the FSM Constitution); ESG Notes, *supra* note 33, Mar. 5, 1979, at 1 (suit filed seeking injunction postponing referendum on the RepMar Constitution); Alik v. Riklon, 1 RepMar Select Dec. 2 (1982) (suit challenging election results); Kabua v. Republic of the Marshall Islands, 1 RepMar Select Dec. 13 (1984) (suit seeking declaration that Compact is null and void).

406. Andohn v. FSM, 1 FSM Intrm. 433 (App. 1984); Alaphonso v. FSM, 1 FSM Intrm. 209 (App. 1982); Lorennij v. Muller, 1 RepMar Select Dec. 45 (1984); Ebot v. Jablotok, 1 RepMar Select Dec. 8 (1982); Taisacan v. Manglona, Civ. App. No. 82-9004 (D.C.N.M.I. 1983).

407. Nix v. Ehmes, 1 FSM Intrm. 114 (Pon. 1982).

tions,[408] the American-style court system appears to be thriving.

The second general observation is that the trends in the TT High Court opinions undermine the theories that postulate intentional American schemes[409] to create dependency or "entrap" Micronesia. One such theory holds that the aim of the American administration was to neutralize the loci of traditional power,[410] that the courtroom was the main battlefield between the traditional and democratic systems,[411] and that the courts "robbed" Micronesians of their traditional values.[412] The TT High Court did limit, or maintain limits imposed by previous foreign powers upon, the powers of traditional leaders. For example, the power to settle disputes by waging war was suspended, and divestment of customary rights was limited by a "good cause" requirement. However, the court in other cases upheld the customary powers and rights of traditional leaders and refused to sanction rejection of those leaders by individuals. Moreover, the court consistently demonstrated a deep appreciation of the importance of custom in cases where it could have subverted custom to undermine the traditional leadership, had that been its purpose.

Another theory is that the American administration intended to prevent the Micronesians from attaining economic self-sufficiency. Presumably, a strongly protectionist policy[413] was designed to keep Micronesian societies in their "natural" states, incapable of functioning in the international community without United States support. The High Court's trend of integrating American legal concepts, especially the law of contracts, into customary law is directly contrary to any purported policy of fostering dependency. Another trend equally contradictive of the existence of such a policy is the evolution of land tenure toward individual land ownership. The customary land tenure creates prohibitively high transaction costs in buying or leasing land for economic development.[414] The High Court's predilection for individual ownership in close cases tended

408. *See* Goodman & Moos, *supra* note 9, at 79.

409. If the United States had pursued intentional programs aimed at undermining the traditional leadership and keeping Micronesia incapable of economic self-sufficiency, the TT High Court, by far the least "Micronized" branch of government and whose decisions were not subject to review, would have been a most effective instrument to carry out those policies.

410. Lingenfelter, *supra* note 6, at 61.

411. Gumb, *supra* note 400, at 4.

412. Uludong, *supra* note 9.

413. *See, e.g.*, Crocombe, *Principles and Problems of Land Tenure in the Pacific*, 1 MICRONESIAN PERSP., Feb. 1978, at 5 [hereinafter cited as Crocombe].

414. The Marshallese developed an interesting approach to the problems created by customary patterns of holding interests in land with respect to the land use for the Kwajalein Missile Range. The Kwajalein Atoll Corporation was formed for the purpose of negotiating with the United States government for leasing the land and distributing the land rent payments to the many individuals holding interests in the land.

to increase the opportunities for economic development.[415]

The overall impression of the performance of the TT High Court is that of judges balancing the importance of custom with the unavoidable pressures to change in order to cope with the modern world, against a backdrop of centuries of modification due to contact with previous foreign powers. All change is not necessarily bad, and some Micronesians believe that change is not only necessary and unavoidable but also beneficial to all.[416] It is for the Micronesians to determine which aspects of their culture they will keep and which they will discard,[417] and, on balance, the TT court system preserved those decisions for them.[418]

415. *But see* Crocombe, *supra* note 413, at 5.

416. Goodman & Moos, *supra* note 9, at 87.

417. The individuals most anxious to preserve intact Micronesian culture for its own sake are non-Micronesians. Goodman & Moos, *supra* note 9, at 87. For a piercingly accurate evaluation of these individuals see HEINE, *supra* note 133, at 155-56.

418. For example, the RepMar High Court will take judicial notice of a change in custom when the new custom is firmly established, generally known, and peacefully and fairly uniformly acquiesced in by those whose rights are affected. Jacklick v. Jejo, 1 RepMar Select Dec. 9 (1983).