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CONSTITUTIONAL JURISPRUDENCE OF THE FEDERATED STATES OF MICRONESIA SUPREME COURT

Bruce Turcott*

I. INTRODUCTION

The Federated States of Micronesia (the FSM) is an island nation composed of four states—Yap, Truk, Pohnpei, and Kosrae—located in the geographic and cultural region just north of the equator in the Western Pacific which is known as Micronesia. Its capital is on the island of Pohnpei, approximately 2400 miles southwest of Honolulu, Hawaii. The country's population centers are on a few high, volcanic islands, with numerous outlying, inhabited and uninhabited coral atolls. The Federated States is one of several newly self-governing Micronesian nations.¹

The region was, until recently, a post-World War II, United Nations trust territory administered by the United States through the Department of the Interior.² On November 8, 1975, Micronesian delegates to a constitutional convention formally adopted the Micronesian constitution; the constitution was then ratified by the Micronesian people on July 12, 1978.³ On its effective date, May

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1. Other new Micronesian nations are the Republic of Belau and the Republic of the Marshall islands.

2. For a discussion of the transition from the trusteeship to self-government with respect to court systems, see 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. HAW. L. REV. 57, 60-61, 65-68 (1983).

3. The FSM Constitution was ratified only in the former Trust Territory districts which became the four FSM states; in the districts which became the political entities mentioned in note 1, *supra*, the Constitution did not win approval. The FSM Constitution is reprinted at 5 U. HAW. L. REV. 372 (1983). For a discussion of the transition to self-government and analysis of the constitutional text, see Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419 (1986). A firsthand account

10, 1979,⁴ a constitutional national government was established, with the consent of the United States administering authority.⁵

The institutions of the present government were established at different times. The Congress of the Federated States of Micronesia has the longest tenure of these institutions; its forerunner, the Congress of Micronesia, was established in 1964.⁶ The executive branch was founded in 1979. The Federated States of Micronesia Supreme Court was founded in 1981.⁷ Although legislative, executive and judicial branches were fully functioning, United States Trust Territory Government institutions, including a High Commissioner and a High Court, retained legislative veto and certiorari review powers,⁸ respectively, over their Micronesian counterpart institutions until the termination of the trusteeship.

On November 3, 1986, proclamations of the Presidents of the United States and the Federated States of Micronesia, by proclamation, implemented the Compact of Free Association, which established a new political status of free association between the Federated States and the United States. The Compact had previously been approved by the United States Congress⁹ and, in Micronesia, by popular plebiscite¹⁰, the FSM Congress, and all four state legislatures. The treaty ceded certain military rights and obligations to the United States, including the right to deny military ac-

of the constitutional convention is contained in N. MELLER, *CONSTITUTIONALISM IN MICRONESIA* (1985).

4. The effective date of the FSM Constitution was established by resolution of the FSM Interim Congress, pursuant to the terms of FSM CONST. art. XVI, § 1. Burdick, *supra* note 3, at 430.

5. Sec. Int. Ord. No. 3039, 44 Fed. Reg. 28,116 (1979), provided the "maximum permissible amount of self-government . . . for the Federated States of Micronesia . . . pursuant to [its] Constitution . . . pending termination of the 1947 Trusteeship Agreement." *Id.* at § 1. It expressly delegated executive, legislative, and judicial functions of the Trust Territory Government to the Federated States of Micronesia. *Id.* at § 2. The transfer of executive and legislative functions occurred in 1979, and the transfer of judicial functions on May 5, 1981, when the FSM Supreme Court was certified operational by the Chief Justice of the Trust Territory High Court pursuant to § 5 of the secretarial order. The Trust Territory court continued to exercise jurisdiction of a gap-filling nature where state courts had not yet been established because the FSM Supreme Court is a court of limited jurisdiction. See Bowman, *supra* note 2, at 66-68.

6. See N. MELLER, *THE CONGRESS OF MICRONESIA* (1969).

7. The structure and early history of the FSM Supreme Court is described in Turcott, *The Beginnings of the Federated States of Micronesia Supreme Court*, 5 U. HAW. L. REV. 361 (1983).

8. See Bowman, *supra* note 2, for an analysis of the High Court's controversial exercise of its certiorari powers in a case solely involving interpretation of internal FSM law, *FSM v. Otokichy*, 1 FSM Intrm. 183 (Tr. Div. Truk 1982). See also "War" in the *Micronesian Courts*, PAC. MAG., July-Aug. 1983, at 16-17.

9. 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 Marshall Islands).

10. The plebiscite was held on June 21, 1983. The voters of the State of Pohnpei did not give a majority approval to the compact.

cess to third countries,¹¹ but left the Federated States otherwise self-governing.¹²

The subject of this article is the interpretation of the Federated States of Micronesia Constitution by the highest national court established under that Constitution,¹³ the FSM Supreme Court. Selected opinions interpreting the Due Process¹⁴ and Supremacy Clauses¹⁵ and the "judicial guidance" provision¹⁶ of the Constitution will be examined, as will the Court's approaches to constitutional interpretation. The Court's jurisdiction over "major crimes" and the role of Micronesian custom in Court deliberations are also reviewed. In sum, this article is an introduction to FSM Supreme Court constitutional jurisprudence.

It should be noted that there are presently only two constitutionally-confirmed FSM Supreme Court justices, Chief Justice Edward C. King and Associate Justice Richard H. Benson.¹⁷ At the trial level, one of the justices presides and renders a decision.¹⁸ A special problem arises when an appeal is taken, since the Constitution requires a three-judge panel to hear appeals. The trial judge must recuse himself, leaving only one FSM justice to sit on the panel.¹⁹ Accordingly, the Chief Justice has appointed two judges from other courts by virtue of his authority under the Constitution and Judiciary Act to make special assignments.²⁰ Judges from the FSM state courts, the Supreme Court of the Republic of Belau, the Federal District Court for the District of the Northern Mariana Islands, and the Court of Appeals for the Ninth Circuit have served as designated justices on FSM Supreme Court appellate panels. Thus, appellate-level decisions are currently made with the participation of one constitutionally-confirmed FSM justice and two specially-appointed justices.

II. SOURCES OF AUTHORITY FOR INTERPRETING THE CONSTITUTION

In *Alaphonso v. FSM*,²¹ the convicted criminal defendant, Pako Alaphonso, appealed his conviction in the FSM Supreme Court's

11. Compact of Free Association, Oct. 1, 1982, United States-Federated States of Micronesia, tit. III., reprinted at 48 U.S.C. § 1681 note (Supp. IV 1987).

12. *Id.* § 111.

13. FSM CONST. art. XI, § 2.

14. *Id.* art. IV, § 3.

15. *Id.* art. II.

16. *Id.* art. XI, § 11.

17. For biographical information about the two FSM justices, see Turcott, *supra* note 7.

18. The jury system is not used in the Federated States.

19. FSM CONST. art. XI, § 2.

20. FSM CONST. art. XI, § 9(b); 4 FSM Code § 104 (1982).

21. 1 FSM Intrm. 209 (App. Div. 1981).

trial division for assault with a dangerous weapon to the Court's appellate division on the grounds of insufficient evidence for a conviction and improper rejection of an alibi defense. The appellate panel determined that it was faced with the task of deciding the appropriate burden of proof to be placed on the government in order to obtain a criminal conviction in the Federated States.

The *Alaphonso* appellate panel's opinion, authored by Chief Justice Edward C. King, contains the Supreme Court's most complete statement of its approach to constitutional interpretation. *Alaphonso* sets out a paradigm for determining the meaning of provisions of the FSM Constitution and the persuasiveness of outside legal authority in the Federated States.

The Court began by noting that litigants had merely cited United States legal authorities and decisions of United States courts without explanation of their relevance to judicial decision-making in the Federated States of Micronesia.²² It considered such an approach insupportable as United States case law is not binding in the Federated States.²³ The FSM court system is not connected with the courts of the United States or of any foreign nation. Further, the Court thought that such an approach was inconsistent with a provision of the FSM Constitution critical to Micronesian jurisprudence.

Article XI, § 11 of the Constitution is the "judicial guidance" provision. It states: "[c]ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia." The holdings of other nations' courts, made under different social and cultural circumstances, may not be adopted without scrutinizing their appropriateness for Micronesian culture and geography. The Court in *Alaphonso* found that the Journals of the Constitutional Convention indicated that the framers of the Constitution intended such scrutiny. A committee report on the judicial guidance provision expressed the fear that, without the provision, the new courts might simply follow past Trust Territory court decisions or other foreign decisions. This practice would often be undesirable since "much of the reasoning utilized in these various courts may not be relevant here in Micronesia."²⁴ The committee report went on to note that Micronesia is culturally and geographically unique.

The Court concluded that, in interpreting the Constitution, it must begin by seeking guidance from sources in Micronesian law

22. *Id.* at 212.

23. *Id.*

24. *Stand. Comm. Rep. No. 23*, II J. MICRO. CONST. CON. 821, 822 (1975), quoted in 1 FSM Intrm. at 213.

and circumstances.²⁵ First, it looked to the language of the Constitution itself. The Constitution does not specify a standard of proof in criminal cases. The Due Process Clause simply states, "[a] person may not be deprived of life, liberty, or property without due process of law."²⁶

The Court found that the meaning of the Due Process Clause in regard to a standard of proof in criminal cases was not self-evident. Therefore, it turned to the Journals of the Constitutional Convention to see if the intent of the framers on this issue could be ascertained.

The constitutional convention committee reports revealed that the Micronesian delegates had principally relied upon interpretations by the United States Supreme Court and other United States courts of the similar provisions in the United States Bill of Rights in their discussions of the proposed Micronesian Declaration of Rights. The proposed Due Process Clause was explained in the committee reports exclusively by the use of the United States Supreme Court decisions interpreting the Due Process Clause of the Fifth Amendment to the United States Constitution.²⁷ Indeed, the *Alaphonso* Court noted, the language of the two provisions is nearly identical. The lesson which the Court gleaned from this reliance upon American case law was that decisions of United States courts interpreting a nearly identical constitutional provision may be used as guide to the content of the analogous Micronesian provisions where the latter's meaning was not self-evident.²⁸

An interesting corollary followed from this reasoning. Since the touchstone in constitutional interpretation is the intent of the framers, the United States courts' interpretations of similar constitutional provisions in the FSM constitution may serve as evidence of the framers' intent only up to the time that the FSM Constitution was adopted or ratified.²⁹ As noted above, the Micronesian framers adopted the Constitution on November 8, 1975; it was later ratified by popular plebiscite on July 12, 1978. These dates may signify acceptance by the Micronesian framers, and later by the voters, of the meaning given to similar constitutional provisions by United States case law at that time. Therefore, United States legal authority may be persuasive to the Micronesian court if rendered before November

25. 1 FSM Intrm. at 213-14.

26. FSM CONST. art. IV, § 3.

27. *Stand. Comm. Rep. No. 23*, II J. MICRO. CONST. CON. 793-804 (1975), cited in 1 FSM Intrm. at 215. Compare the United States Due Process Clause, U.S. CONST. amend V, ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .") with the FSM Due Process Clause, quoted in text accompanying note 26, *supra*.

28. 1 FSM Intrm. at 216.

29. *Id.*

8, 1975 or July 12, 1978. The persuasiveness, if any, of later United States opinions ought to be much diminished.

As the *Alaphonso* Court recognized at the outset, the judicial guidance provision compels all court decisions to be consistent with Micronesian culture and geography. The Federated States of Micronesia took on much of United States constitutional law as its own and then cast off the moorings to set its course into the future.

After determining the intent of the framers that United States court decisions could serve as a guide to the meaning of the Due Process Clause, the Court examined the body of United States case law. The United States Supreme Court had previously determined that the burden of proof upon the government in criminal cases was proof "beyond a reasonable doubt." The FSM Supreme Court, however, did not end its analysis there. Following the mandate of the judicial guidance provision, that "we may not follow blindly decisions of the United States or other courts,"³⁰ it evaluated the reasons that the United States Supreme Court gave for adopting this burden of proof. Thus, *Alaphonso* demonstrates that the reasoning behind the United States interpretations of even identical constitutional provisions must be reviewed for its applicability to the Micronesian setting.

The first reason given by the United States Supreme Court was "virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions." Although not bound by common law concepts due to the judicial guidance provision, the Court thought it useful to consider the lessons and experience of other legal systems. It briefly reviewed the history and nature of the common law system of jurisprudence. Noting that such a system is now employed throughout the world, including India, third world nations in Africa, and across the Pacific, the Court agreed with the United States Supreme Court that "virtually unanimous" adherence to the reasonable doubt standard by such a worldwide array of sovereignties was significant.³¹

The second reason which the United States Supreme Court gave for the reasonable doubt standard was its value as a safeguard against erroneous convictions. The United States Supreme Court found that the right of the individual not to lose his liberty and suffer the stigma of an unjust conviction outweighed the burden on society of obtaining a conviction under the reasonable doubt standard. Society "values the good name and freedom of every individual" and thus shall not condemn a person where there is a reasonable doubt of his guilt.

The FSM Supreme Court was confident that Micronesians val-

30. *Id.* at 219.

31. *Id.* at 219-20.

ued protecting the freedom of the individual in a like manner. It suggested that, though in small islands everybody knows one another and each may think he knows who is guilty of committing a crime, the possibilities of a misinformed rumor, prejudice, and inflamed community passions are ever-present in all human societies. Thus, the need for the reasonable doubt standard as a safeguard also applied in Micronesia.³²

The *Alaphonso* Court also found relevant the United States Supreme Court's final reason for the reasonable doubt standard. It agreed with the United States Supreme Court that the community requires a high standard of proof in criminal trials in order to ensure public respect for the criminal justice system. People in the community at large must not doubt that only guilty people are being convicted in the courts. The FSM Supreme Court believed that Micronesians would best respect their criminal justice system if it "proceeds cautiously and respects the liberty of individual Micronesian citizens" despite the passions and demands of an inflamed community.³³

Thus, the FSM Supreme Court found that the framers' intent regarding the standard of proof to be placed upon the government in order to obtain a criminal conviction could be properly found in a United States Supreme Court decision and that the reasons for that decision also fit conditions in Micronesia. It noted in a footnote that adoption of the reasonable doubt standard would not work any change in the criminal law formerly followed in the geographic area in which the FSM is located. The Trust Territory trial courts, in existence since postwar times, had consistently applied the reasonable doubt standard.³⁴

III. MAJOR CRIMES JURISDICTION

In *Alaphonso*, the charge of assault with a dangerous weapon was prosecuted in the Micronesian national court. Such a crime is not tried in Micronesian state courts, as is the United States practice, because the allocation of jurisdiction between the state and national courts is different in the FSM. The FSM Constitution expressly delegates the power to Congress "to define major crimes and prescribe penalties, having due regard for local custom and tradition."³⁵ The First FSM Congress enacted a comprehensive National Criminal Code. The Code defined major crimes as all crimes punishable by three or more years of imprisonment, or crimes in

32. *Id.* at 221-22.

33. *Id.* at 222.

34. *Id.* at 223 n.7.

35. FSM CONST. art. IX, § 2(p).

which \$1,000³⁶ or more in monetary loss resulted, or attempts to commit such a crime. Accordingly, the FSM Supreme Court has jurisdiction over such offenses.³⁷

In *Tammow v. FSM*,³⁸ the FSM Supreme Court appellate division was asked to overturn a conviction for aggravated assault in the trial division on the ground that the definition of major crimes by Congress in the National Criminal Code was unconstitutional. Defendant Tammow argued that the Congress had no power to define and punish criminal behavior that was not national in character. He contended that the major crimes distinction made by the Code did not accord with federalism as practiced in the United States. In view of the FSM's borrowing from the United States governmental system, the National Criminal Code ought to be unconstitutional as contrary to analogous principles of Micronesian federalism. Tammow also claimed that the Code's definition of major crimes was contrary to the intent of the framers of the Constitution.

In an opinion authored by Designated Associate Justice Mamoru Nakamura, Chief Justice of the Supreme Court of the Republic of Belau, the appellate division rejected Tammow's challenge and upheld the constitutionality of the National Criminal Code. The Court noted that prior opinions had found models for constitutional interpretation in the laws of the United States, as in the *Alaphonso* opinion discussed above. However, in such cases, the language being interpreted had been borrowed from the United States Constitution. The Major Crimes Clause could not be interpreted by resorting to United States law because it was not borrowed from an American source but rather was a Federated States innovation.

The language of the Major Crimes Clause, according to the *Tammow* Court, is clear and unambiguous. The clause contains no limiting language which would narrow the scope of Congress' power to define and punish major crimes. Therefore, such crimes need not implicate the national interest. If the framers of the Constitution had intended that Congress' authority be limited to national crimes and that the United States model be followed, addition of the clause would have been superfluous. Congress

36. 11 FSM Code § 902 (1982). In 1987 the FSM Congress amended the National Criminal Code to redefine major crimes as crimes which are punishable by imprisonment for ten years or more. This redefinition also deleted crimes which result in monetary losses below a certain amount. For example, the amount of loss required for the theft and misuse of credit cards to constitute a national crime was increased to \$5,000. The effective date of the amending legislation was delayed for one year to afford the states an opportunity to enact gap-filling criminal laws. Pub. L. No. 5-40, 5th Cong., 2nd Reg. Sess. (1987).

37. FSM CONST. art. XI, § 6(b).

38. 2 FSM Intrm. 53 (App. Div. 1985).

would have the power conceded by Tammow's interpretation in any event; the United States Constitution has no general crimes clause in its legislative article.

The *Tammow* Court found that the framers of the FSM Constitution intended to allocate criminal jurisdiction based on the severity of the crime rather than national, as opposed to state, interests. The framers implicitly made the judgment that the national interest of the new federation included punishing criminals. Therefore, the Court rejected the American distinction between national and state crimes.

Tammow also argued that the Major Crimes Clause centralized power excessively. The Court rebutted such second-guessing of the framers' policy decisions. It held that "[g]eneral principles gleaned from an entire constitution and constitutional history may not be employed to defeat the clear meaning of an individual constitutional clause."³⁹ The founders fashioned a type of federalism for Micronesia to suit local conditions, with decentralization where appropriate. The Court cited the handling of land issues as an example of an area in which the framers intended to create a decentralized, federalist system in order to respond to diverse local conditions. Land, scarce on small islands, is centrally important in all Micronesian cultures. The framers reserved for the states the power to legislate regarding land and inheritance, and they placed jurisdiction over land matters in the state courts, rejecting the former Trust Territory system of centralized jurisdiction over land matters in the Trust Territory High Court. Pohnpei, for example, has a land commission, with authority over land surveys and title registration and with power to hear and decide disputes involving land. Such decisions are reviewable by the state court. In contrast to the land issue, the Court did not find criticism of the centralized Trust Territory system of criminal justice in the journals of the constitutional convention.

IV. JUDICIAL REVIEW: THE *SULDAN* CASE

In 1983, prior to *Tammow*, the FSM Supreme Court's Pohnpei trial division was called upon to decide the constitutionality of an act of the FSM Congress in *Suldan v. FSM(II)*.⁴⁰ The petitioner challenged the validity, under the Due Process Clause, of the statutory scheme governing his dismissal from national government employment as a policeman.

Pursuant to the National Public Service System Act,⁴¹ the petitioner, after being terminated, appealed and was given a hearing

39. *Id.* at 59.

40. 1 FSM Intrm. 339 (Tr. Div. Pon. 1983).

41. 52 FSM Code § 156 (1982).

before an ad hoc committee. The committee recommended reinstatement and, in accordance with the procedure prescribed by the act, transmitted its recommendation to the "highest management official," in this case the Federated States of Micronesia President Tosiwo Nakayama, for final decision. The President "disapproved" the recommended reinstatement, "not on its merit but so that the case may be appealed to the FSM [Supreme] court." He perceived a conflict of interest because the Attorney General's Office was advising him on the case. The Attorney General's Office had also been Suldan's employer and presumably would advocate his dismissal.

In the first *Suldan* opinion,⁴² the court decided that the case was not yet ripe for review. It remanded the case to the President for his decision. Several grounds for lack of ripeness were advanced. First, the court noted that the President's final decision might be in favor of the discharged employee. The need for a court decision would be eliminated in such a case, and unnecessary constitutional adjudication would be avoided. The court recalled the principle announced in an earlier opinion of the appellate division that statutes should be construed with a view to avoiding questions of constitutionality whenever possible.⁴³

Second, the President's wish that the court decide the case could not be accommodated due to separation of powers concerns.⁴⁴ Congress had passed a statute expressly delegating authority over public employment termination to members of the executive branch. In addition, the Act clearly manifested an intent that administrative remedies had to be exhausted before a court may review a termination. In remanding the case, the court noted that due process may require that the final decision-maker review the record of the ad hoc committee hearing even though the statute simply directed the highest management official to make the final decision, without providing any procedural guidance.

This latter aspect of the statute was challenged the second time the *Suldan* case came before the trial division. The President, after the remand and a review of the record, had concluded that Suldan's dismissal was appropriate. Suldan challenged the statute as violative of due process because it did not require the highest management official to base his decision on information in the ad hoc committee hearing record.

The court, in the *Suldan (II)* opinion,⁴⁵ began by confronting the issue of judicial review. It noted that this case presented the

42. 1 FSM Intrm. 201 (Tr. Div. Pon. 1982).

43. *Id.* at 205.

44. *Id.* at 205-06.

45. 1 FSM Intrm. 339.

first attack on the constitutionality of a statute and that the court had not previously determined whether it had the power to declare void an act of Congress. Following the *Alaphonso* approach to constitutional interpretation, the court began by turning to the language of the Constitution itself. Although there was no explicit treatment of judicial review in the Constitution, other provisions had bearing on the issue. The Supremacy Clause declared, “[a]n act of the government in conflict with this Constitution is invalid to the extent of the conflict.”⁴⁶ The court also noted that the Constitution placed all state and national government officials under a duty, imposed by their oaths of office, to exercise their powers in accordance with the FSM Constitution.⁴⁷

More importantly, the judiciary enjoys final responsibility for interpreting the Constitution. In it is vested the judicial power of the national government.⁴⁸ The judiciary is vested with original and appellate jurisdiction over all cases arising under the Constitution.⁴⁹ Article XI, § 8, also requires certification to the FSM Supreme Court from state or municipal courts of substantial questions requiring interpretation of the Constitution.⁵⁰ The FSM Supreme Court is the highest court in the nation and its decisions are required to be consistent with the Constitution.⁵¹

The court reasoned that officials in any branch of government could not obtain their powers from the Constitution and then be free to disregard the constitutional limits on those powers. Ultimate responsibility for interpreting the Constitution is placed upon the judiciary; it is “forsworn by the Supremacy Clause from enforcing national laws or treaties contrary to the Constitution itself.”⁵² Such a finding would require that the law be declared invalid to the extent of the conflict.

Thus, the court found that the power of judicial review was established independently in the FSM judiciary by the FSM Constitution. Following its earlier observation that the FSM Constitution is modeled on the United States Constitution, the court also considered the constitutional interpretation of United States courts.

The court compared relevant provisions of the two constitutions.⁵³ Neither document directly addressed judicial review of the constitutionality of legislation, yet the seeds of the doctrine could be found in both. Separation of powers among three branches was

46. FSM CONST. art. II, § 1.

47. 1 FSM Intrm. at 343.

48. *Id.*, citing FSM CONST. art. XI, § 1.

49. 1 FSM Intrm. at 343, citing FSM CONST. art. XI, §§ 6(b) and 7.

50. 1 FSM Intrm. at 343, citing FSM CONST. art. XI, § 8.

51. 1 FSM Intrm. at 344, citing FSM CONST. art. XI, §§ 2 and 11.

52. 1 FSM Intrm. at 344.

53. *Id.* at 345.

common to the two schemes.⁵⁴ The judicial provisions were similar,⁵⁵ as were the Supremacy Clauses.⁵⁶

The court then turned to American constitutional jurisprudence and the seminal American case of *Marbury v. Madison*.⁵⁷ The United States Supreme Court in *Marbury* invalidated an act of Congress granting the Supreme Court original jurisdiction in excess of that which Article III of the United States Constitution accords the Supreme Court. The FSM court argued that the FSM Supremacy Clause, declaring the Constitution alone as the supreme law, was even more suggestive of judicial review than its United States counterpart, which gave supremacy status to the United States Constitution and laws and treaties. The *Marbury* Court upheld the United States Constitution over a conflicting United States law.⁵⁸

Suldan (II) court also considered persuasive the long American experience under judicial review and its practical effectiveness. It noted that, although judicial review had its origins in the common law and in the United States, it is now found worldwide, in countries with civil law and other legal traditions. Thus, the Federated States of Micronesia, by adopting judicial review, would not be following a distinctively American practice. Nor would it work any change from the practice of the Trust Territory courts which operated in the area earlier.

In summary, the *Suldan (II)* court found that judicial review in the Federated States of Micronesia was mandated by provisions of the FSM Constitution itself, though no provision of the Constitution directly addressed the issue. Where the words of the Constitution are "ambiguous or doubtful," the court must seek to discover the intention of its framers. The provisions of the United States Constitution relevant to judicial review are similar to provisions of the FSM Constitution. Since judicial review was "at the very heart of the American constitutional system," the court found a presumption that the framers intended to adopt judicial review in drafting

54. Both the United States and FSM Constitutions provide for separation of powers between executive, legislative, and judicial branches and create a federal system reserving plenary legislative powers to states. See Burdick, *supra* note 3.

55. Compare FSM CONST. art. XI with U.S. CONST. art. III.

56. Compare FSM CONST. art. II, § 1 ("This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of that conflict.") with U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

57. 5 U.S. (1 Cranch) 137 (1803).

58. 1 FSM Intrm. at 345 n.6.

the FSM Constitution in 1975. No statements rejecting judicial review were found in the constitutional journals; therefore, its acceptance could be presumed.⁵⁹

Once past the threshold issue of whether the court had the power to review statutes for their constitutionality, and to strike them down if it found them in conflict with the Constitution, the court proceeded to analyze the challenged statute. It found that the challenged provision of the National Public Service System Act could be harmonized with the due process demands of the Constitution.

After deciding that Suldan's interest in continued government employment qualified for protection under the Due Process Clause as "property,"⁶⁰ the Court addressed the validity of the statutory termination procedure. It rejected, in a footnote, the concept that the government could confer a property right but also limit the procedural protection available to preserve the right.⁶¹ Therefore, the procedure for termination of government employees must satisfy the minimum demands of due process. The fundamental concept articulated by the Court was that the government must not act in an "unfair, arbitrary manner;" it must follow a "fair and rational decision making process."⁶²

Suldan attacked the termination procedures of the National Public Service System Act because they gave the ad hoc committee's decision on termination merely advisory status and did not expressly require the final decision-maker to base his decision on the record of the committee hearing. In Suldan's case, the President did, in fact, make a "complete and careful" review of the record. The Court stated, however, that an unconstitutional statute cannot be saved by voluntary administrative action. The President did not order reinstatement, as recommended by the committee, but he disagreed with the committee on a question of law and upheld the petitioner's termination.⁶³ The President found that sick and annual leaves granted to cover Suldan's unexcused absences from work did not amount to a waiver by the government of its right to terminate him for those unexcused absences.

The Court found it significant that the President overturned

59. *Id.* at 348-49.

60. The FSM Supreme Court held that, to qualify as property under the Due Process Clause, there must be a claim of entitlement based on governmental assurance of continued employment or dismissal only for specified reasons. 1 FSM Intrm. at 352, 353-54, *citing* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78 (1972). The procedural provisions surrounding termination assured such an entitlement in claimants under the National Public Service System Act.

61. 1 FSM Intrm. at 354 n.17.

62. *Id.* at 354-55.

63. *Id.* at 355-356.

the ad hoc committee's recommendation because of a disagreement on the law, rather than on the facts. Consistent with its limitation under the National Public Service System Act to a review of the governing law,⁶⁴ the Court upheld the President's interpretation and Suldan's termination.

The statutory termination scheme placed the ad hoc committee in a fact-finding role governed by elaborate procedural safeguards. The Court concluded that the highest management official's role as the final decision-maker was intended as a safeguard against decisions inconsistent with governmental policy. Thus, a legal conclusion of the committee could be reversed without any reference to the record if the legal issue was unaffected by any factual disputes. If the final decision-maker reversed the committee on the facts or on a mixed question of fact and law, he would be required to review all pertinent parts of the hearing and to explain his analysis in his final decision in order to meet the due process requirements of the FSM Constitution.⁶⁵

V. MICRONESIAN CUSTOM: THE COURT'S ROLE

The FSM courts are required by the Constitution to make their decisions "consistent with . . . Micronesian customs and traditions."⁶⁶ The National Criminal Code provides:

Customary Law. For purposes of administration and enforcement of this act:

(1) Generally accepted customs prevailing within the Federated States of Micronesia relating to crimes and criminal liability shall be recognized and considered by the national courts. Where conflicting customs are both relevant, the court shall determine the weight to be accorded to each.

(2) Unless otherwise made applicable or given legal effect by statute, the applicability and effect of customary law in a criminal case arising under this act shall be determined by the court of jurisdiction in such criminal case.⁶⁷

Three FSM Supreme Court opinions, all criminal cases, have addressed the role of custom in judicial decision-making from varying perspectives. They are *FSM v. Ruben*,⁶⁸ *FSM v. Mudong*,⁶⁹ and *In re Iriarte (II)*.⁷⁰

64. "Disciplinary actions . . . shall in no case be subject to review in the Courts. . . except on the grounds of violation of law or regulation or of denial of due process or of equal protection of the laws." 1 FSM Intrm. at 356 n.18, quoting FSM Code § 157 (1982).

65. 1 FSM Intrm. at 360-61.

66. FSM CONST. art. XI. See also *supra* text accompanying note 24.

67. 11 FSM Code § 108 (1982), cited in 1 FSM Intrm. at 139.

68. 1 FSM Intrm. 34 (Tr. Div. Truk 1981).

69. 1 FSM Intrm. 135 (Tr. Div. Pon. 1982).

70. 1 FSM Intrm. 255 (Tr. Div. Pon. 1983).

In *FSM v. Ruben*, one of the trial division's first cases in Truk, the court held that familial relationships are perhaps the most important component of the custom and tradition referred to in the Constitution⁷¹ and in the National Criminal Code.⁷² Family relationships "are at the core of Micronesian society and are the source of numerous rights and obligations which influence practically every aspect of the lives of individual Micronesians."⁷³

Defendant Ruben's brother-in-law attempted to enter Ruben's house in the middle of the night while the family was asleep. Ruben chased the intruder away, inflicting a cut on his chest with a machete. Although the trial court acquitted Ruben, it was willing to consider that a person should use less force than otherwise permissible to expel an intruder from his house at night when the intruder is the person's wife's brother.⁷⁴ It also noted that customary obligations to a relative, the victim in *Ruben*, are not necessarily fulfilled or mooted by an acquittal.⁷⁵

In *FSM v. Mudong*, the Pohnpei trial division heard two consolidated cases. Both cases involved charges of assault with a deadly weapon. Customary settlements had taken place. Also, both cases involved incidents of violence which were only a part of more generalized hostilities, with the potential in each case that full-scale family feuds might erupt.

In the first case, one hundred people, including members of the families of the victim and of defendant Mudong, met after the incident to discuss the friction between the families. Apologies were offered and accepted. To "solemnize the occasion and to purge the bad feeling," both sides drank Pohnpeian *sakau*, a ceremonial beverage sacred in Pohnpeian custom and known elsewhere in the Pacific as *kava*. Thereafter, both sides desired that "bad feelings be put to a stop," and they sought to have the criminal prosecution dismissed.

In the other case considered in *Mudong*, several high-ranking traditional leaders met as arbitrators with the families of the persons involved in an assault. The families and traditional leaders wanted to settle the affair through the social mechanism rather than the criminal process and the defendant sought dismissal of his criminal prosecution.⁷⁶

71. FSM CONST. art. XI; see also *supra* text accompanying note 24.

72. *Supra* text accompanying note 67; see also *infra* text accompanying note 80.

73. 1 FSM Intrm. at 40.

74. *Id.* at 41.

75. *Id.* at 41-42.

76. For a discussion of the Trust Territory High Court's handling of a request for dismissal of a Yap murder case for cultural reasons under prior Trust Territory law, see Bloom & Bloom, *An Examination of the Use of Transcultural Data in the Courtroom*, 10 BULL. AM. ACAD. PSYCHIATRY L. 89 (1982).

The trial court began its analysis by noting that under prior Trust Territory statutes, customary law was overridden by the written law where there was a conflict.⁷⁷ Thus, custom was placed in an inferior legal position. The National Criminal Code adopted by the FSM Congress, however, mandated recognition and consideration of relevant custom in criminal cases.⁷⁸ Custom is not placed in a position superior to the Constitution and FSM statutes, but the trial court noted that the National Criminal Code allows that, in appropriate circumstances, customary law may override certain of the Code's specific provisions.⁷⁹

Given this mandate, the trial court proceeded to consider the effect of a customary apology on a criminal prosecution. The trial court decided that dismissal was not generally called for when a customary apology had been made, nor specifically in the two cases at bar, where no exceptional circumstances were present.

The trial court cited two factors against dismissal before discussing the societal implications of policy choices relevant to determining the relationship between customary and written law. First, the policy of prosecutorial discretion favors leaving the decision whether to prosecute or dismiss a case in the hands of the prosecutor, who opposed dismissal in these two cases. Although the prosecutor lacked authority to dismiss an existing prosecution on customary grounds, the trial judge could dismiss based on the prosecutor's suggestion. Second, the defendants had not met their burden of proof in showing the effect of a customary settlement on a court proceeding. The National Criminal Code placed the burden of proving the existence, applicability, and effect of custom on the party asserting the custom:

Where there is a dispute as to the existence or effect of customary law applicable to a criminal case arising under this act, the party asserting applicability of customary law has the burden of proving by a preponderance of the evidence the existence, applicability and customary effect of such customary law.⁸⁰

The court then discussed the mutual roles of custom and the courts. It pointed out that the major purpose of customary forgiveness in island life is to end conflict and defuse intense emotions between families, clans, and communities so that harmony may prevail. The legal system, on the other hand, serves the larger society and its need to preserve order and respect for its laws throughout the state and nation. The legal system also addresses the

77. 1 FSM Intrm. at 138, *citing* 1 T.T. Code §§ 101, 102; *Ngrasmengesong v. Trust Territory*, 1 T.T.R. 615 (App. Div. 1958); *Ngrachelbad v. Merii*, 2 T.T.R. 631 (App. Div. 1961); *Trust Territory v. Lino*, 6 T.T.R. 7 (Tr. Div. Marshall Islands 1972).

78. *Supra* text accompanying note 66.

79. 1 FSM Intrm. at 139-40.

80. *Id.* at 143, *citing* 11 FSM Code § 108(3) (1982).

accountability of the individual for his or her actions. Thus, according to the trial court, customary law and the constitutional legal system perform different but complementary roles. Customary settlements remain valuable in recreating local harmony but do not render the court's performance of its different functions unnecessary. Neither system controls the other.⁸¹

The court stated that it had considered dismissing the cases even though the defendant had not met his burden of proof to show that such an effect was customary. The court speculated that more customary settlements might result in the future if these cases were dismissed. It could not do so, however, without violating the National Criminal Code, which directed the court to recognize generally accepted customs and determine the applicability and effect of customary law. No permission was given to the court to create new custom.⁸²

Finally, the court noted that custom was injected at a specific point in criminal proceedings by statute. The National Criminal Code provided, "In determining the sentence to be imposed, the court shall . . . give due recognition to the generally accepted customs prevailing in the Federated States of Micronesia."⁸³ The FSM Supreme Court has considered a customary apology to be a mitigating factor in sentencing ever since the *Mudong* opinion.

Finally, *In re Iriarte (II)*, another Pohnpei trial division opinion, discussed traditional leaders and the law. The case involved a high-ranking Pohnpeian traditional leader charged with contempt of court for verbally abusing a municipal judge of the Trust Territory court system. The court recognized that such a charge against a traditional leader who is entrusted with the people's respect was shocking. It held that while traditional leaders are not above the law, they also do not forfeit the rights of FSM citizenship.⁸⁴ Accordingly, the court concluded that due process rights⁸⁵ apply to traditional leaders as they do to other persons.

The court found that the lack of a hearing by the Trust Territory court on the contempt charge, coupled with a denial of bail, violated the due process guaranteed by the FSM Constitution. The court was certain that a high-ranking traditional leader having deep ties to Pohnpeian society could be expected to appear for court proceedings.

81. 1 FSM Intrm. at 144-46.

82. *Id.* at 146-147.

83. *Id.* at 147, citing 11 FSM Code § 1003 (1982).

84. 1 FSM Intrm. at 270-72.

85. The Court stated that due process guarantees "the right to reasonable notice of the charges, the right to examine any witness against the defendant, to offer testimony, and to be represented by counsel." 1 FSM Intrm. at 260 (citing *In re Oliver*, 333 U.S. 257 (1948) and *Taylor v. Hayes*, 418 U.S. 488 (1974)).

Citing *Mudong*, the court re-affirmed that "the constitutional government sought not to override custom but to work in cooperation with the traditional system in an atmosphere of mutual respect."⁸⁶ While the government would apply the law to traditional leaders, proceedings involving them must be conducted with "scrupulous care and sufficient sensitivity to avoid diminishing unnecessarily the stature of any traditional title."⁸⁷

VI. CONCLUSION

This article has examined some of the early jurisprudence of the Federated States of Micronesia Supreme Court as it begins its task of interpreting the Constitution of that new nation. Jurisprudential development has already occurred in the areas of due process, burden of proof in criminal cases, sources of legal authority, judicial review, and the role of custom in court proceedings, as well as in other areas of jurisprudence not reviewed here. The Federated States of Micronesia Supreme Court has accomplished much in its first years.

86. 1 FSM Intrm. at 271.

87. *Id.* at 271-272.