CUSTOMARY LAW AND RECEIVED LAW IN THE FEDERATED STATES OF MICRONESIA

ANKUSH SHARMA[*]

INTRODUCTION

> ... the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.[1]

Trends in both the substantive law and legal culture of a given society are regularly the subject of scrutiny and debate. Such an interest in shifts of legal culture arises, as de Tocqueville points out above, because of the inevitable impact they have on broader society. It is, in particular, identifying the source of the initial impetus in the change of legal culture that attracts much inquiry and contemplation.

In this respect, the role of the judiciary and courts cannot be understated. When courts interpret and apply law in given factual situations they fulfil an integral role in defining the content of the law and giving it a broader social relevance. This is particularly applicable to the judicial interpretation of constitutional provisions, especially those provisions that confer rights and duties on individuals and groups, such as a 'Bill of Rights'.

In newer societies, where the justiciable law[2] is still developing and therefore highly malleable, there must be a clear idea of how the community wishes the law to be applied and therefore defined. This idea must be supported by consistent practice on behalf of the institutions which make, interpret and enforce the law. Without such a nexus, the law is at best a confusing mess and at worst, its authority can be threatened or altogether usurped. History is replete with instances where the expectations of society are not matched by the realities imposed by its legal system. One only need take a cursory look at the ubiquity of bribery and corruption in many Third World countries to accept such a proposition.

In the South Pacific, the conflict between the idea of law and its reality is a common feature of most, if not all, of its respective legal landscapes. The need to secure a role for traditional customs and customary law is frequently juxtaposed against the pressures of the outside world and its written, Western-derived law. How to negotiate a path through these often conflicting demands is a challenge of some importance and one relevant to the entire region.

To undertake an examination of such issues within the South Pacific would be a task of considerable size. That is why this paper has limited itself to the Federated States of Micronesia, and more particularly, a key decision of its Supreme Court.

CUSTOMARY BEATINGS IN MITIGATION OR AS A BREACH OF THE CONSTITUTION: *TAMMED V FEDERATED STATES OF MICRONESIA*[3]

Facts

The case was heard as a consolidated appeal in the Supreme Court Appellate Division, from the Supreme Court Trial Division of two separate and unrelated proceedings of sexual assault. Within days of both assaults, the attackers had received severe beatings from members of their respective victims' family and village as customary punishment for their actions.

In the case of Joseph Tammed, the sexual assault occurred against a school student in March 1988. Ten days later, his victim's relatives forcibly took Tammed to the home of the victim's father where he received a severe beating. The court noted that the thrashing he received was so fierce there was a possibility that he may not fully recover from some of his injuries.

In the later case of Raphael Tamangrow, the sexual assault occurred in July 1988 against a victim who was of a higher caste. In a scenario similar to that of Tammed, six days after the assault had taken place Tamangrow was abducted and beaten by villagers of the victim. His beating was so severe that he required hospitalization.

There was general agreement between all parties that the beatings received by both appellants were broadly consistent with established custom and tradition, which consequently led the Court to treat such practices as factual, rather than as questions of law. This, however, must be qualified with the recognition that there remained some contention that the treatment received by Tamangrow did in fact violate custom on a number of grounds. However, the Court declined to consider these claims in any detail given the stated position of the Yap attorney general to accept that the punishment had been in accordance with Yapese custom. Significantly, the Yap attorney general chose not to prosecute those individuals who participated in the customary beatings of the appellants.[4]

Nature of Cause of Action

As indicated above, the action was a consolidated appeal against the sentencing decision of the Supreme Court Trial Division. Both appellants claimed that the trial court erred in not giving mitigating effect to the beatings each had received when it handed down their respective sentences. It can be inferred from the Supreme Court's opinion that the appeal for mitigation was argued on the grounds of both the customary and non-customary nature of the beatings.

Outcome

The Court ordered that upon remand, the beatings should be held to have some mitigating effect, but without having any regard to their customary implications or their compatibility with the criminal law or civil rights.

Preliminary Legal Principles

As a preliminary to the Court's substantive decision, it was held that the Supreme Court Appellate Division was to apply the same standards in sentencing appeals that it generally applied in criminal appeals. It distinguished the more restrictive US position on the grounds of its 'unique historical considerations' and the court's task to create a system of jurisprudence relevant to the FSM.

The Court had also found, as a preliminary to the determinations below, that as the relevant Micronesian criminal code provisions[5] offered a range of alternative sentences, it implicitly granted a sentencing court discretion to determine the appropriate sentence for a particular defendant. As such, it impliedly prescribed the use of 'individualised sentencing' in FSM courts. This principle operates to place the focus 'at all times' on the defendant, his/her 'background and potential and the nature of the offence.' Its objective is to produce 'a just sentence tailored to respond to the defendant, his background and the nature

of his crime.'

Ratio Decidendi

The Court's core decision can essentially be reduced to two 'dimensions.'[6]
The first dimension obliges a court, when determining the sentence to be imposed, to have regard to punishments, such as the beatings inflicted upon the appellants, irrespective of their customary implications. To not do so is contrary to the implied mandate of individualised sentencing.
In the second dimension, where a beating or other such punishment possesses customary implications, a court that is determining a sentence must consider giving additional mitigating effect to those implications in handing down its decision. Failure to do so would violate implicit statutory requirements[7] enacted pursuant to the Constitution[8] as well as the Judicial Guidance Clause.[9] This dimension only comes into operation if specifically requested by the defendant.

Obiter Dicta

Where a state attorney general or relevant government official fails to act against a beating or other punishment because of its customary nature, such practices have acquired the character of an official state action. This is because the customary punishment has acted in substitution of the proper judicial functions required under FSM law. In such circumstances, it is imperative that the customary practice (and its practitioners) is judged against the same legal standards that would be applicable to state officials as if they themselves had directly carried out the punishment. More specifically, the exercise of such practices and punishments must comply with the due process provisions under the Declaration of Rights,[10] as required by the Judicial Guidance Clause. Failure to do so renders those actions unlawful and incapable of any mitigating effect under the 'second dimension.'

ANALYSING THE COURT'S DECISION

Purpose and Effect of the Decision: Two Views

A brief analysis of the second dimension of the Court's primary ruling extracts two antagonistic understandings of the role and authority of custom in the sentencing process within the FSM. It is arguable that these opposing interpretations are characteristic of both extremes of the relationship between local custom and received law throughout most South Pacific nation-states.

A. The Negative View: Rendering Custom Subordinate and Powerless

To fully appreciate the reasons behind the decision in *Tammed*, it is first necessary to study the record of the presiding judge in that case, Chief Justice Edward C. King.[11] Many of his relevant past decisions reveal a general pattern of judicial decision-making that afforded custom a less than dominant role. It is evident that he generally regarded principles of US common law as more persuasive than Micronesian customs.[12] His stated desire to create a Micronesian jurisprudence was seemingly restricted to the fashioning of selective common law jurisprudence, largely devoid of any substantial customary law influence.
Chief Justice King was a product of Indiana University Law School from which he graduated in 1964.[13] He was joined on the bench in this case by two 'designated justices'. One of them was an expatriate Australian, C. Guy Powles and the other was a local judge, John B. Tharngan, who possessed limited formal legal training.[14] The decision was, however, written by and ultimately up to Chief Justice King.

It seems apparent that Chief Justice King was inclined, like many judges in the South Pacific, to err on the side of caution when deciding highly contentious and landmark cases. Judges, whether expatriates or locals, have deeply ingrained habits that are a result of years of legal education and practice. Not surprisingly, it then becomes difficult for members of the judiciary to subsequently release themselves from those inclinations born out of their legal training when they are faced with a choice between the 'legal' route or a local, customary one. This proclivity causes considerable difficulties for any effort to develop jurisprudence relevant to local circumstances. Judges are after all, as Blackstone puts it, 'the depositaries of the laws; the living oracles'.[15]

In examining the nature of the decision's impact on the role and status of custom in the FSM, the preceding background is useful in pinpointing how the decision in *Tammed,* which accepts a role for custom in mitigation, does in fact strip custom of its autonomous legal force. To read the decision and consider the above background, it is apparent that Chief Justice King 'wanted retaliatory beatings to stop.'[16] He achieved this by invoking the imported principles of 'due process' and 'state action', which compelled the compliance of customary punishment with the Declaration of Rights.[17]

In such a reading of *Tammed* it becomes apparent that the exercise of traditional methods of punishment has now become subordinately bound to principles of law directly transplanted from a foreign culture. It was quite the judicial sleight of hand that the Court utilised the Judicial Guidance Clause – a clause inserted to ensure the operation of custom in courts[18] – to effectively make custom a secondary source of law.

It seems that in both purpose and effect, Chief Justice King had sought to demand such stringent requirements for the lawful exercise of custom as to make its practice within the societal context of the FSM exceedingly difficult to achieve. Native Micronesians see the legitimacy of their customary practices as derived from the consensual authority they vest in their communities.[19] They do not see state actions and law as *their* actions or law.[20] Thus, by infusing the act of customary punishment with state authority and character, the decision in *Tammed* has caused such practices to no longer embody its original customary quality. It then logically goes that the court is no longer considering customary law as traditionally understood, for its very decision to impute due process requirements has fundamentally altered the character of the practice such that it is no longer custom.

From this perspective, *Tammed* has done any plan to create an original Micronesian jurisprudence a substantial disservice.

B. The Positive View: Ensuring the Procedural Integrity of Customary Practices

To extract an alternative, beneficial view of *Tammed*, emphasis must be placed on the Court's proviso that for additional mitigation to occur in light of the customary nature of punishment, minimum evidential requirements must be attained.[21] That is, it must be shown that the beatings were carried out in compliance with customary requirements.

We couple the above stipulation of the Court with a view that holds customary law as 'embedded in a matrix of social relationships which alone give [it its] meaning.'[22] Accordingly, the substance of custom cannot be disconnected from the decision-making process in which the custom is used.[23] Put simply, 'the ways and techniques by which [customary societies] arrive at a settlement that contributes towards social harmony, are no less part of the customary law than abstract rules of substance.'[24] As procedure is so central to customary law, ensuring the integrity of such processes inevitably secures the role of and respect for customary modes of punishment.

It is arguable that *Tammed* ensures such integrity is maintained if we interpret the Court's decision as emphasising compliance with the processes inherent in customary law. This allows customary practices and punishments to be accepted by the court as legitimate.

But there are problems with this view. Primarily, it is questionable whether due process principles are the best mechanism for ensuring the procedural integrity of customary practices. Due process notions are

inordinately and particularly Western in their content. They are founded on the notion of the rule of law, which detests 'proceedings full of blind revenge and abhorrent to the spirit of the law.'[25] It also affords minimum guarantees of a 'fair and public hearing by a competent, independent and impartial tribunal.'[26] Clearly, such a guarantee is hostile to the particular facts of *Tammed* and the fact that dispute resolution in South Pacific societies 'has often to be seen within the context of political relationships.'[27] Independence and impartiality in such an environment is therefore largely unattainable. Nevertheless, in this respect, *Tammed* does operate to safeguard the rights of the many 'impecunious, untitled 'common' Micronesians' who are apprehensive of any wholesale reliance on the traditional system.[28]

However, it is conversely relevant to acknowledge that the Court in *Tammed* left open the precise content of the 'due process' requirements, such that it remains possible that local understandings may act as the source of their particular substance. It seems that the Court in the resentencing hearing impliedly accepted this latter view.

C. Resentencing Hearing

On remand to the Supreme Court of Micronesia's Trial Division, the Court reduced the sentences of each defendant by six months in having regard to the non-customary nature of the beatings.[29]

On whether additional mitigating effect could be given to reflect the customary nature of the beatings, the Court found that on the evidence the beatings were not customary.

In *obiter dicta*, the Court added that even if the beatings were found to be customary, mitigating effect could not be given, for an additional finding that the punishment was consistent with the Constitution was not able to be made. The Court identified the failure to demonstrate that a 'responsible' leader had identified the wrongdoer, prescribed the punishment's scope or supervised the beatings as key reasons for so ruling.

Although the result supports the 'negative view' elucidated above, the Court did leave some scope for the application of the 'positive view.' It did so by hinting that the procedural requirements for due process were those prescribed not by US jurisprudence, but rather by the customary practice itself. Should the defendants have proved the beatings were customary and then demonstrated the role of a 'responsible' leader in the beatings (as required by the custom) the Court suggested that it would have granted additional mitigating effect.

D. Sentencing Laws in Other South Pacific Jurisdictions

The particular operation and relevance of customary punishment to sentencing decisions is a well-recorded area of the law in the South Pacific. In Samoa, for instance, it operates through section 8 of the *Village Fono Act 1990*.[30]

In Vanuatu, the authoritative case of *Waiwo v Waiwo*[31] detailed the court's practice of taking into account any relevant customary punishment as a mitigating factor in sentencing.[32] However, on appeal, the Court of Appeal handed down a conflicting decision to that offered at trial.[33]

In Fiji, courts have also given due and substantial recognition to customary sanctions when adjudicating on the imposition of a sentence.[34]

In Papua New Guinea, section 4(e) of the *Customs Recognition Act* 1963[35] requires a court to consider any customary punishment in determining the penalty to be imposed. There have been numerous cases heard on this provision, [36] including one pertaining to its constitutionality.[37] It is, however, worthy to note the effect of the *Underlying Law Act 2000*, which evidently impliedly repeals provisions of the *Customs Recognition Act*.

As far as this writer is aware, issues of 'due process' have not arisen in the above jurisdictions. It may be relevant to suggest that the reason for the appearance of such legal requirements in the FSM can be partly

attributed to the prominent role played by American law there.

LOOKING AT THE BIGGER PICTURE

Judicial decisions that, despite their good intentions, curtail or inhibit the operation of customary law are unfortunately common in the South Pacific.[38] Such decisions may be justifiably attributed to the cautious and reflexive approaches of members of the South Pacific judiciary, who prefer the safety of the familiar over the uncertainty of the unknown. However, that is perhaps not the entire story. Any apprehension on the part of a judge to apply customary law in lieu of received law must be viewed in light of the fundamental incompatibilities of the two systems of law.

The decision in *Tammed* raises, albeit indirectly, a number of significant issues that relate to the problems of having customary and received law work in tandem in the South Pacific. The received law, being largely derived from English (and in the FSM's case, American) common law is characterised by certainty and predictability, having been forged through the perpetual judicial refinement of precedent. This state of affairs manifests itself in mostly concrete terms, whether as acts of parliament or case law. It is from such sure sources, that an impartial judge will apply what is relevant.

Such processes stand in stark contrast to the common features of customary law in the South Pacific. The precise content of the practice, principle or story that comprises the customary law is frequently uncertain, contentious and perhaps even ambiguous. It is most often oral and can therefore be subject to considerable scrutiny and challenge by the received law. Further, and as *Tammed* demonstrates, the 'judge' in customary law is often not the impartial adjudicator that one finds in and is expected by the received law. He or she is rather, well entwined in the dispute by virtue his or her social or political connections with the parties. This is a point that was explored above.

Essentially, the result of the conflicting fundamentals of the two systems is an inevitable conflict. Whereas one expects certainty, impartiality and universality, the other demands subjectivity and an adherence to timeless local traditions however they may be interpreted and applied. *Tammed* demonstrates this discord by highlighting the procedural demands of received law (through the Bill of Rights) against those of customary law (i.e. the customary beatings).

On the upside, the case may also demonstrate a common ground between customary law and received law. This was discussed above in respect of the strong preoccupation with procedure that characterises received law. It was similarly noted that procedure occupies an important role in customary law. Accordingly, the received law may be able to function so as to 'sure up' the customary law. This could be achieved by letting the received law ensure that customary law is applied in accordance with its own procedural requirements, rather than as something else merely dressed in customary clothes.

CONCLUSION

The purpose of this paper has not been to engage in any in-depth analysis of the sentencing laws in the FSM or elsewhere in the South Pacific. Rather, it has been, like much of the literature on law in the South Pacific, to examine the relationship between the received law and customary law in that region. In doing so, it was originally posited that the courts, and judges in particular, are of the view that applying the common law of the West to South Pacific societies to 'regulate' or even modernise the customary law is acceptable and even beneficial.

In contrast, there was expressed the view that is predicated on the notion that the received law is infused with the ideational by-products of its own historical development, which are distinct and often antagonistic to that of South Pacific communities. The contrast between customary forms of dispute resolution and American notions of due process raised in *Tammed* are clear indicators of this difference.

Received law can be destructive of the traditional role of law in South Pacific societies because of their

fundamental differences discussed above. These differences are widely acknowledged and often lead to questions about which 'law' should take precedence when they come into conflict. What is often not discussed enough is how they may reinforce one another. *Tammed* has suggested a possible role for the received law in securing the procedural integrity of customary law. Whether this will or can happen, it is submitted, is invariably up to the 'living oracles' – the judges.

It might be apt at this junction, to once more quote de Tocqueville:

> An American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs. He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves.[39]

Well after *Tammed* had been decided, Justice King indicated that he had thought it more appropriate that the significant issues raised there were better resolved in dialogue between traditional and governmental leaders.[40] This is an admirable view, but one that it seems is difficult to support when reviewing the effect of his decision.

One commentator has offered the view that 'customary law and state law are placed at either end of a divide with no bridge between.'[41] There is some, albeit limited, hope that *Tammed* was and is the first step toward building the much needed bridge between the two 'laws' in the FSM.

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[*] BA (Hons), LLB (Hons) (Queensland), Trainee Solicitor, Asahi Lawyers, Brisbane, Australia.

[1] Alexis de Tocqueville (translated by George Lawrence), *Democracy in America* (Fontana Press edition, 1994), 270.

[2] Justiciable law is that type of law where "a plaintiff can obtain a favourable judgment by filing a suit in a court, following proper procedures, and proving his claim by a preponderance of acceptable evidence." See Dan Fenno Henderson, 'The Japanese Law in English: Some Thoughts on Scope and Method' (1983) 16 *Vanderbilt Journal of Transnational Law*, 609.

[3] *Tammed v Federated States of Micronesia* [1990] FMSC 13; 4 FSM Intrm. 266 (App. 1990).

[4] The Yap attorney general prosecuted the appellants despite their customary punishments because the crime of sexual assault at the time fell under national jurisdiction. This has since changed.

[5] See 11 F.S.M.C. § 1202 (formerly § 1002).

[6] Note that the Court itself did not use such classifications.

[7] 11 F.S.M.C. § 1003.

[8] Article V § 2.

[9] FSM Constitution Art XI § 11.

[10] Art IV of the FSM Constitution.

[11] He has since 1992 been replaced with a Micronesian, Andon Amaraich.

[12] See for example *FSM v Ruben* 1 FSM Intrm. 34 (Truk 1981); *Alaphonso v FSM* 1 FSM Intrm 209 (App. 1982). For exceptions, see for example *Semens v Continental Air Lines, Inc.* 2 FSM Intrm. 131 (Pon. 1985); *Panuelo v Pohnpei* 2 FSM Intrm 150 (Pon 1986) (custom was applied through analogy).

[13] Brian Z. Tamanaha, 'Looking at Micronesia for Insights About the Nature of Law and Legal Thinking' (1993) 41 *The American Journal of Comparative Law* 29.

[14] Brian Z. Tamanaha, above n 13, 11.

[15] William Blackstone, *Commentaries* (1803), Volume 1, Introduction, Section III at [69].

[16] Brian Z. Tamanaha, above n 13, 45.

[17] *FSM Constitution*, Article IV, § 3; § 5; § 6; § 8.

[18] 'The intent and purpose of [the Judicial Guidance Clause] is that future Micronesian courts base their decisions not on what has been done in the past but on a new basis which will allow the consideration of

the pertinent aspects of Micronesian society and culture.' Report of the Committee on General Provisions, Standing Committee Report No. 34 (1975) 2 *Journal of the Micronesian Constitutional Convention of 1975* 822 available at
<http://www.vanuatu.usp.ac.fj/library/Paclaw
/FSM/Micronesian%20Constitutional%20Convention%20-1975-Vol-2.pdf> at 06 July 2006.

[19] Brian Z. Tamanaha, above n 13, 46.

[20] Brian Z. Tamanaha, above n 13, 46.

[21] The Court cited the Australian decision of *Mamarika v Regina* (1928) 42 A.L.R. 94 where the practice of spearing was denied any additional mitigating effect as it had not been carried out in compliance with customary law.

[22] A. L. Epstein, 'Procedure in the study of customary law' (1970) 1(1) *Melanesian Law Journal* 52.

[23] Keebet von Benda-Beckmann, 'The use of folk law in West Sumatran State Courts', in Antony Allott and Gordon R. Woodman, eds., *People's Law and State Law – The Bellagio Papers* (1985) 87.

[24] Obeid Hag Ali, "The Conversion of Customary Law to Written Law" in Alison D. Renteln and Alan Dundes, eds., *Folk Law* (1995) 358-9.

[25] Wilfried Bottke, ''Rule of Law' or 'Due Process' as a Common Feature of Criminal Process in Western Democratic Societies' (1989-90) 51 *University of Pittsburgh Law Review* 439.

[26] Wilfried Bottke, above n 25, 440.

[27] A. L. Epstein, above n 22, 55.

[28] Edward C. King, 'Custom and Constitutionalism in the Federated States of Micronesia' (2002) 3(2) *Asian-Pacific Law & Policy Journal* 260.

[29] *Federated States of Micronesia v Tammed* [1990] FMSC 18; 5 FSM Intrm. 426 (Yap 1990) Benson J

[30] 'Where punishment has been imposed by a Village Fono in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of sentence the punishment imposed by that village Fono.' See the case of *Attorney-General v Ioane* [1994] WSCA 20 for the provision's application.

[31] [1996] VUSMC 1.

[32] Above n 31, [47].

[33] *Banga v Waiwo* [1996] VUSC 5; Vanuatu Supreme Court Appeal Case 1/1996.

[34] *Regina v Lati* [1982] FJSC 5.

[35] Formerly the *Native Customs (Recognition) Act* 1963.

[36] *Acting Public Prosecutor v Aumane* [1980] PNGLR 510; *The State v Emp Mek* [1993] PNGLR 330; *The State v Osborn Kwayawako* [1988] PNGLR 174.

[37] *State v Joseph Kule* [1991] PNGLR 404 (where the court denied the operation of the provision partly in light of the fact the custom offended the Constitutional prohibition on slavery).

[38] See, for instance, a series of cases in Samoa concerning the constitutionality of customary practice of banishment: *Italia Taamale v The Attorney-General (Western Samoa)* (1995) C.A. 2/95B; *Lafaialii v Attorney-General* [2003] WSSC 8 (24th April, 2003); *Leituala v Mauga* [2004] WSSC 9 (13th August 2004).

[39] Alexis de Tocqueville, above n 1, 269.

[40] Edward C. King, above n 28, 280.

[41] Brian Z. Tamanaha, 'A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia' (1989-90) 13 *Hastings International and Comparative Law Review* 106.