



MICRONESIAN SEMINAR
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THE RULE OF LAW



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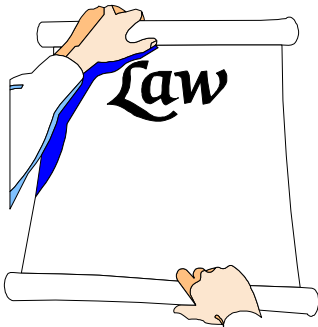


Law in an Island Society

Law, in the most general sense of the word, is basic to human society. All communities, however small and traditional, operate according to what we might call “rules,” even if these rules are not formalized, much less codified, the way modern laws are.

Within a year or two of my arrival on Pohnpei, I remember walking into a *nahs* during a funeral celebration only to hear my Pohnpeian guide admonish me to take off my baseball hat. Not for the first time in my life, I had been guilty of a breach of protocol. If I had been silly enough to sit on the platform of the *nahs*, next to the *Nahnken*, who happened to be present, I’m sure I would have received a harsher rebuke from my guide.

Then there was the time a boatload of us headed off to a small island in Chuuk for a picnic. At our arrival, we found the tiny island deserted and coconut fronds tied to many of the trees. We decamped anyway and began our picnic until we were accosted by a middle-



aged Chuukese who told us with a mournful look that the man who owned the islet had died just a few weeks before. We glanced at one another, not knowing how to respond, until he added that the island was placed off limits for three months following his death. Finally, we understood what he was getting at, so we packed our things, mumbled our apologies, and left the island as quickly as our 40-horsepower engine could take us.

A few years ago, during a visit to a Yapese village, one of the women in our party made the mistake of entering the men’s house, for which she was admonished. So she beat a hasty retreat from the men’s house and took a seat on one of the stone platforms in front of the house. When she was told this was contrary to the culture, she decided to eat her lunch standing up for fear of violating another



have once been said about some of other institutions that have been

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introduced from abroad—hospitals, churches, and schools, for instance. The modern legal system, which undergirds the government structure of our island nations today, is no more of a



good feelings for the sake of the community?

The modern legal system, in its attempt to determine where justice lies when two parties have contesting claims, is forced to decide between the two parties. Ideally, there is one winner and one loser in this system. In practice, though, the modern legal system today is moving increasingly toward procedures that build consensus through compromise. Even so, the adversarial nature of court proceedings may often intensify rather than diffuse the hostility between the two parties.

By contrast, traditional processes for resolving disputes and settling contesting claims value the reestablishment of good working relations between the rival parties. This is only natural, for without the hope of reconciliation a small society would be torn apart in short order. If there is little hope that the conflict can be resolved in this way, people generally prefer to look the other way rather than deal with it head-on. Instead of running the risk of intensifying bad feelings and generating further hostility, people would rather let the storm pass and hope that the hard feelings are abated in time. This is the preferred strategy for dealing with land disputes everywhere in Micronesia, and it is a major reason that they cannot be resolved speedily.

Conclusion

The two justice systems—the process once generally employed on small islands and the modern legal system—pose a striking contrast to one another. Each one has its strengths, which in turn are the roots of its weaknesses. If the traditional system seemed to emphasize harmony and reconciliation, it may have done it at the expense of individuals or groups that had no leverage in the island society. The modern legal system offers recourse to any individual, no matter how humble, for redressing wrongs that were done that person by another, no matter how high-placed. The government itself may be taken to court by an individual who feels that the government has done him an injustice.

Many of us are still used to more traditional forms of justice and find the modern system unfamiliar and alien. The same might



taboo. Then we retreated to the nearby house of an acquaintance of mine. Again the woman attempted to sit down, and again she was admonished to sit somewhere else. She had taken the seat next to the betelnut basket belonging to the head of the estate. For the rest of the visit, with a look of resignation on her face, she simply stood.

There's nothing like being a newcomer in a place to remind one that, however laid back life may appear in an island community, there are "rules" that guide cultural behavior. Hundreds of them. These are the invisible rules that make up custom, the rules that the newcomer to a place finds himself violating one after another to his or her embarrassment. Often enough our faux pas are graciously overlooked, now and then they are publicly corrected, but always they are a reminder of the multitudinous norms that clutter the cultural landscape and offer limitless stumbling blocks for foreigners.

When the Rules are Not Observed

Although people were governed by the rule of custom, which could be dissected into hundreds of behavioral rules, they did not unflinchingly observe these rules, any more than Americans or Australians today observe the law in their own societies. When they failed to comply, it was not out of cultural ignorance, like me and other expatriates, but because of self-interest, laziness, sheer stubbornness, or any number of other reasons.



Violations of even less weighty rules, however, could bring reprisals. These might not be visited upon a person in the form of direct punishment, but by other, more subtle means. Someone who failed to meet his obligations to contribute to a community feast might be ridiculed as stingy. A man who did not care properly for his children (or his elderly parents) might be the subject of gossip and suffer a serious loss of prestige in the community. If the crime



was serious enough, the one responsible for it might even be ostracized from the community. The “rules” of custom had teeth, thanks to the sanctions that a close-knit community could impose. The community enjoyed a healthy measure of power to correct improper behavior because of the array of different forms of social control it had at its disposal.

More serious breaches of the rules, which could occur from time to time, could lead to much stronger repercussions. Two Yapese boys who raped a couple of girls one evening were accosted by the girls’ relatives a few days later and beaten so badly that both had to be hospitalized. Punishment for crimes against individuals often took the form of retaliation in traditional societies. Even today, some of the villages of Yap have reinstituted the custom of tying up for long periods of time boys caught stealing betelnut from trees belonging to others.

On Pohnpei a man who went around soliciting young girls caught a beer bottle in the head one night while relaxing at a sakau market. “The girls were too young and he went about it all wrong,” was the explanation I received from my Pohnpeian mentor. A family in Chuuk that had given a parcel of land to the church for use as a private school discovered that the church was subleasing the land to the government for cash payments. Convinced that the church was not complying with the original purpose of the gift, the family made strong efforts to recover the parcel of land. This led to a long and bitter dispute between the church and the family.

In the Event of Disputes

Disputes over land were common in the past, we can assume, just as they are today. In one such dispute over land that took place on Pohnpei in the early 1950s, two brothers carried on a feud that threatened to engulf their entire family and much of the community. Finally, an uncle intervened and ordered the two brothers to divide the parcel equally between them. They complied and the feuding ended as suddenly as it had begun. In land disputes



kinds of disputes in the future.

Different Systems, Different Emphases

The modern legal system, as we have seen, is founded on law—the constitution and the other laws enacted since the constitution has gone into effect. The fundamental question in any court decision is “What does the law say?” Once that is determined, there are additional questions regarding how the law should be applied in this particular situation. In theory, at least, no account should be taken of the rank or status of the person brought before the court. Whether he is chief or commoner, president or private citizen should make no difference when he stands before the law in judgment. Indeed, this is the reason that justice in a modern legal system like that of the United States is often portrayed as a blindfolded woman holding a balance in her hand. “Justice is blind,” as we often hear, for it does not see the social identity and background of the person who comes before the court. It sees only an individual standing before the law that is uniformly applied to everyone.

It’s hard to imagine blind justice operating in a traditional island society. When two parties came before a traditional leader to have their dispute settled, the leader, like everyone else in the

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community, is fully aware of the social identities of the two contesting parties and is expected to take this into account in resolving the case. The social identity of the parties, including their rank and status, as well as the history of the relationship between the two parties must be factored into making a decision that could settle the quarrel and bring peace to the community. This means, of course, that a compromise is often struck between the two parties. But why not, if the touchstone is not the law but restoring unity and



for making it stick.

Lawsuits have become increasingly common in our day. The courts are clogged with land disputes, charges of breach of contract, attempts to get back loans or money owed, and domestic disputes involving divorce or child custody. “I’ll take you to court” is a refrain being heard nearly as frequently in FSM today as in the United States. People are entitled to use the court to obtain what is owed them. They can hire a lawyer to represent them and force the other party to do the same to argue their case in a formal court setting before a state judge. Sometimes, in fact, this is their only recourse if they are to obtain satisfaction. But a full-dress court case is not always the best solution and it should be looked upon as the final resort in solving disputes between Micronesian citizens.

The most effective means of resolving disputes are often still to be found in those age-old methods that were used for settling conflicts in small island societies. Most outer islands, for instance, continue to resolve their own internal disputes through mediation between the two parties by a chief or other respected elder in the community. This method is still used widely when disputes occur between two members of an outlying area who are subject to the same authority. In Yap, in fact, it is required that if the contesting parties are from the same village, they submit their dispute to village leaders before they take the matter to court. Very seldom do the parties insist on going to court once the village decision is handed down.

There are other, less traditional means that may also be used. A procedure for settling small claims between two parties is now being used successfully in Kosrae and Pohnpei, and is being considered by authorities in Yap and Chuuk. The settlement is handed down by a judge, but without attorneys for each side. Hence, this method is cheaper than a regular court case and can also be carried out much more quickly. This procedure is used solely for the settlement of debts, with the collection of payment set to the satisfaction of both parties. Procedures such as this may point the way to cheaper, more effective and more culturally appropriate ways of handling other



between different families the ranking authority in the village or municipality might be called in to render a decision.

Land disputes, although common, were not the only kind of conflict that arose in the community. There were grievances that arose over injuries done a family. This might happen in the case of divorce, especially when someone had “stolen” the wife of another, or it could occur when someone was wounded or killed. Like land disputes, such cases were usually settled by the local chief or some other respected person in the community.

Dispute resolution was conducted, in the presence of both sides, in such a way as to compensate the aggrieved party for damages. Equally important, however, was the goal of assuaging hurt feelings and bringing about a reconciliation of the two parties. This is a great part of the rationale behind a common practice carried on in the case of a killing. Strange as it may seem to foreigners, the assailant was often adopted by the family of the young man he had killed. The adoption would serve as restitution, inasmuch as it provided the family of the lost son with a surrogate worker, but it also provided a lasting kinship bond between the two families that would ensure peace in the future.

Why Change?

As we have seen, then, traditional island societies had “rules”—unexplicitated perhaps, but norms governing the behavior of each and all, depending on each one’s status in the society. Attached to these “rules” were sanctions, the ways in which the community enforced such rules—even if only by the fear of gossip. Finally, there were means of resolving disputes between parties over land, personal injury and other matters.



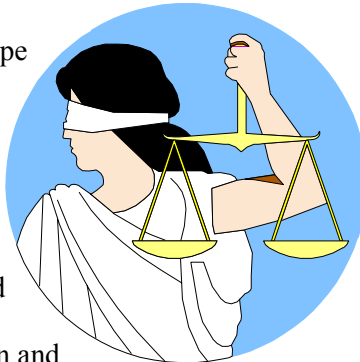
If traditional societies possessed systems that worked, why not simply revert to them? Why change an age-



old structure that sprang up from the island social environment and was seemingly so well suited to island life? Why introduce a Western legal system in order to fulfill the needs that were already being met by a local system?

The Western legal system, as we know, was first imposed by colonial governments during the past century. In actual fact, though, life continued much as it always had throughout most of the span of this colonial rule. Despite the best efforts of Germans, Japanese and Americans, the age-old land systems remained largely unchanged except in a few places (Pohnpei is one) and in a few respects (land ownership now extends only to the high-tide mark). A foreign-crafted legal system may have blanketed the islands, but at the grassroots level justice was dispensed much as it always had been. The changes in the legal system did not run very deep, at least not until thirty years ago, when modernization intensified everywhere.

It is tempting to dismiss the Western-type legal system as a holdover from colonial days. What we sometimes miss, however, is that such a legal system is an imperative for a modern nation-state in today's world. Tonga, for instance, was never colonized, but is obliged to operate under a modern legal system because this is what is expected of nations today. The modern nation-state demands that countries fashion a constitution and develop the framework of a modern legal system. There are no exceptions to this exigency. A modern legal system is as much a part of modern nationhood as schools and hospitals and airports and



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roads.



what he was doing, or perhaps was wantonly provoked beyond his limits, the justice system should make allowance for this. For a first-time offender, a generally honest and upright individual who for some reason stumbles into trouble, the judge is allowed discretion in sentencing. Discretion is even allowed on whether to prosecute the case in the first place. No one, Pacific Islander or Westerner, wants to bring to trial hungry children who steal loaves of bread, as was done two centuries ago in England. These children, packed off in large numbers to the penal colony in

Australia, still haunt our memory today. Surely, the claims of society must be balanced against the interests of all individuals, including the offender. Nevertheless, society's claims are real and must be honored, however thorny the practical problems this presents.

Civil Cases

The court also handles civil cases, disputes between two individuals or groups. In such cases one party claims to have been wronged by another party and so requests compensation for damages suffered. A contractor, for instance, may sue the person whose house he built for failure to pay the full amount of money stipulated in the contract. Or the house owner might sue the contractor for faulty work and failure to meet the standards agreed upon. Or two land owners might take their dispute over a parcel of land to court. Individuals may even bring the government to court if they feel an injustice has been done them by the government.

If the defendant loses the case, he may be ordered to make good the loss of the contesting party. Any punishment inflicted on the defendant in civil cases comes in the form of a fine. In the event that the losing party fails to comply with the judgment, the other party can bring the matter to court again to force compliance. For instance, when a family is slow in turning over a piece of land that has been ruled as belonging to another, the true owners may return to court to seek enforcement of its ruling. In civil cases, therefore, the court has the responsibility not only for making the judgment but



night.

- Second, the punishment is retribution for the crime. In the reckoning of the modern justice system, the offender owes society a debt for what he has done. The penalty he pays will offset this debt and restore the scales of justice to their proper balance, as it were.
- Third, the punishment ought to rehabilitate the offender. In theory, the fine or imprisonment is supposed to teach him a lesson, to bring him back to his senses, so that he once again becomes a law-abiding citizen and a contributing member of society.
- Fourth, the punishment he receives is meant as a deterrence to others. By punishing the offender, society makes an example of him and warns others that they can expect the same treatment if they behave as he did. His fate is a red flag to others tempted to break the law.

Much of this will sound harsh and unconvincing to people who have been raised in a society that regards leniency and compassion as a virtue. The truth is that I felt my fingers twitching while typing the previous paragraph as I wondered how effective stiff sentences really are in frightening off would-be offenders and how many of those released from US penitentiaries could honestly be called rehabilitated.



“Have mercy on me” was the cry we used to hear from sad-eyed Xavier students as they were summoned to the office to account for their minor “crimes” during their high school years. This is the same cry we hear today from adult offenders in and out of court. The cry deserves to be heard and sometimes heeded. If the offender wasn’t aware of



Membership in the Community of Nations

When a group of islands like FSM (or the Marshalls or Palau) becomes a nation-state, it signals its willingness to interact with the international community. If it is to do this, it must adopt a governing system that other nations can comprehend and interface with. FSM has taken its place as a member of the community of nations, as symbolized by its admission into the United Nations, the Secretariat for the Pacific Community and other international organizations. FSM, like other new nations, is free to craft its own constitution and to enact whatever laws it wishes. But there must be laws, clearly articulated and openly promulgated so that they can be understood by all. Adoption of a modern legal system is the price of doing business with the world community.

Each year FSM receives upward of \$15 million from fishing license fees. This money is the product of negotiations carried on with other countries seeking to fish in these waters. Grants from Japan for capital projects bring in another \$10 million to \$20 million each year. US annual payments under the Compact, like these other sources of income, depend on a modern government structure and the legal system that undergirds it. Likewise, investors from abroad must be assured that there is legislative framework in place to safeguard their investments and protect their rights. Without a legal system, there is little chance that FSM would be able to receive any of this outside support.

Adoption of a modern legal system is the price of doing business with the world community



But the legal system is much more than a device for securing financial assistance from abroad. It is a means of protecting the rights of all, local people and outsiders. The “rule” of local custom is fine for those who are insiders, those who have a secure and respected position in island society. But what about the newcomers, temporary residents, transplanted outer islanders, and others without a sure cultural foothold in society? The legal system is meant to protect not just those who have been born and raised on an island, but all the others on a precarious perch: Palauans living in Yap, Americans and Australians invited to work in Chuuk or Kosrae, Chuukese and Yapese and Kosraeans living on Pohnpei.

The Backbone of the Modern Legal System

Law is the stuff of which our modern legal system is made. So much so that people sometimes refer to adoption of this modern system as submitting to the “rule of law.” Life might have had its rules in a traditional society, as we have seen, but they were never really entwined into formal law. In a modern society, by contrast, people look to law to regulate their lives and define what they can and cannot do. This view of life and law was woven into our everyday speech in the United States. As children growing up in upstate New York, we used to respond to criticism of something we were doing with the retort: “There’s no law against that, is there?” Law was one of the defining principles in our life.

During my years in Chuuk, I often heard the people there refer to their national constitution as the *chuunap*—in other words, the backbone of the law. Like the backbone, the constitution supports the entire skeletal structure of the law. It is the most basic and fundamental of laws, for it defines how the government is to work and how other laws will henceforth be made. It determines the process for lawmaking, it establishes the agencies of government that are charged with enforcing laws, and it creates the institution that will interpret the law. Moreover, the constitution is the touchstone for all other law, in that any other laws must be consistent with the constitution. If the constitution expressly states



compensation for the offended party. In the outer islands of Yap, for example, anyone wrongfully drawing blood from another is required to offer reparation in the form of a piece of land. In some places, large sums of money—or at times even the offender himself—are offered to the injured family. If a settlement has been made between the two families involved, why does the modern legal system require additional punishment? Isn’t it sufficient to have compensated the injured family and restored peace to the community?

The modern legal system answers with a conclusive no, and in doing so adopts a radically different view of the matter from the traditional system. For the modern justice system, the conflict in any criminal court case is not simply between two families; it is between the wrongdoer and society. In this view, the person who burglarized a house or stabbed another in a bar fight has broken the law, and in so doing has shown his disregard for the society that has enacted this law for its own protection. The guilty party has endangered in some way, big or small, the society and the people who make up this society. Hence, the contest in a criminal case is between the individual and the society whose code of behavior he has violated. The society, in turn, brings the person to court to account for his behavior. In doing this, it says to the individual, in effect, “You can’t go around stabbing people, or taking people’s property, or forging checks. The damage you did this time might not be so bad, but if everyone were to do this, our society would be a mess.”



If guilty, then, he is punished for his crime against society, regardless how the injury he has done to the other family has been settled. The punishment inflicted upon him by the court is intended to serve four purposes.

- First, it will impose restraints on the individual so that he cannot repeat the crime. This is especially critical if the person is a habitual offender with a history of burglaries or rapes or violent crime. Imprisonment of those we fear will hurt us makes us all breathe a little easier and rest more securely at



mean in practice and how they are to be applied. Early decisions are normative in dispensing justice until they are modified or the law repealed.

In general, then, the judiciary decides on where justice lies in the competing claims that are brought before the court. It make a judgment on whether the defendant is guilty of the charge and liable to punishment, regardless whether the charge is one of murder or of defrauding an employee of a week's salary. In carrying out this task, the judiciary administers justice in the modern society. As it does this, the court performs a second function: it interprets the law by determining just what the law means in practice and how it is to be applied. Each court decision offers us a little clearer understanding of the meaning of the law. Finally, as it goes about its business, the court is also examining the validity of laws to see if they are in conflict with other, older laws or provisions of the system that might make these new pieces of legislation void.

Criminal Cases: Crime and Punishment

In criminal cases, an individual or a group of persons is charged by the state (or "people") with a violation of the law. A man suspected of badly injuring someone in a fight may be arrested and charged with the crime by the police. When the charge is officially made, the judiciary enters the picture, for the contest between the "people" (or state) and the person charged with committing the crime is played out before a judge in the court. The judge's task is to weigh the claims between the sides and decide whether the evidence presented supports the charge made against the man. If it does not, the defendant is acquitted and is released. If the evidence does support the charge, then he is judged guilty and a further decision is made as to the sort of punishment he should receive. The punishment may come in the form of a fine, imprisonment, or suspension of privileges.

When criminal cases involve serious damage to another party, the families will often meet to work out a reconciliation in traditional island fashion. This will often entail some form of



that anyone will enjoy citizenship by birth who has at least one parent who is a Micronesian citizen, the congress cannot pass laws that will reserve the rights of citizens to those who are born of two Micronesian parents.

The constitution also guarantees the rights of all individuals and groups in the society, whatever their origin. In the multi-ethnic societies that our islands have become, this is an important point. The constitution protects Pingelapese, Mokilese, Mortlockese, Chuukese and Kosraeans who happen to be living on Pohnpei no less than full-blooded Pohnpeians whose family can be traced back to the Saudeleurs or beyond. It protects Woleaians and Lamotrekese in Yap just as much as those from the highest-caste village on the main island. In traditional times, newcomers to an island might have been adopted by a local family or otherwise taken under the protection of an influential family in society. In today's legal system, they need not look for a family to champion them, since they are protected by the constitution.

Suppose a young Micronesian who has studied in the United States returns from college a committed member of the Black Muslim faith. He decides that not only does he want to practice his faith but he wants to found a Black Muslim sect on his island, against the wishes of his family and island leaders who fear that a new religious group will undermine the unity of their community. According to the rights recognized in the constitution, the young man has the freedom to practice his religion and proselytize openly on his island.

Besides freedom of religion, the FSM Constitution guarantees freedom of expression and assembly, even in support of unpopular causes. All citizens of FSM may travel within the nation as they wish and live in whatever part of the nation they want. They are also protected by the constitution against the excesses of the law—illegal searches, invasion of privacy, detainment for a long period without trial, excessive bail, and cruel or capital punishment.

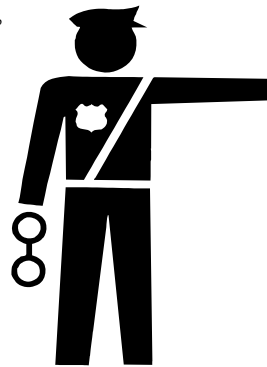


Laws

The constitution may be the backbone of the legal system, but the rest of the skeletal structure must be filled out by other laws that address the needs of a modern society. There are laws governing business, laws mandating services such as education and health care and regulating these services, laws governing banking, laws establishing different sorts of taxes, laws mandating airline procedures and safety practices, laws on radio and telephone use, laws on just about everything else imaginable.

Why so many laws, we might ask. Laws multiply because development brings about new situations that have to be covered to protect people or government from something or another. Life becomes more complicated as development occurs. Modernization brings new needs that must be met and new loopholes that must be plugged. Insurance, which no one needed in the past, has to be governed by law to protect employers, insurers and those covered by the insurance. Land leases for businesses, especially those involving a non-local party, must have clear terms established by law for the protection of both parties. The increasing reliance on money today, and the many ways in which this has changed island life, means that new methods of providing support for the elderly (social security) must be legislated, banking services instituted and controlled, and land exchanges regulated.

In FSM the national congress and the state legislatures are responsible for enacting the laws. They do so, however, with input from the executive branch and with its endorsement. Any bill passed by the legislature is sent to the executive for signing before it can become a law. If the bill is vetoed, the legislature can override the veto. Ideally, however, the two branches should collaborate on the laws since the executive branch has responsibility for enforcing the laws made by the legislature or congress. A law requiring school attendance



between ages 6 and 14 has to be implemented by the Education Department. Traffic laws must be enforced by the police. Sanitation laws must be enforced by inspectors. Hence, the executive branch is responsible for carrying out the laws made by the legislative branch.

The Judiciary

The judicial branch is the “other” part of the modern legal system, the branch that usually remains in the shadows. We are all familiar with the executive and legislative branches since they are normally the headline-makers in the government. The judicial branch, on the other hand, rarely makes headlines at all. This is because it never initiates action, as do the other two branches. Its function is to wait for others to appeal to it for a decision. Only then does the judiciary assume its proper role.

The judicial system does not go into action until a challenge is presented by some individual or group (plaintiff) against some other individual or group (defendant). There are always two contesting parties in any court case, with the judiciary charged with the responsibility for judging where justice lies in the contest between them—who is right and who is wrong. The cases that the judiciary decides may take two basic forms: criminal cases and civil cases.

In rendering decisions on all cases, the court looks first of all to the statutes, or basic laws, to see whether these were broken. These spell out what the law is, but not always how it is to be applied. The law may forbid mail fraud, for instance. But does this particular case, in which fraud may have been perpetrated via the internet, fall under the statute prohibiting mail fraud? Case precedents, which are based on earlier court decisions, may help answer that question, so they must be consulted. It is for this reason that court decisions are supposed to be written and filed. They cannot be consulted years later, when human memory becomes faulty, unless they are properly recorded. Precedents usually help spell out further what these laws