



**MICRONESIAN SEMINAR**  
P.O. Box 160  
Pohnpei, FM 96941



**Micronesian Counselor**

January 15, 2002

Issue 39



*Island Topics* presents...

**"Off The Beaten Path"**

Where do you go to get a job? Off the beaten path, a friendly gecko suggests, as he leads the hero of the video to a series of out-of-the mainstream jobs. To order your \$10 copy, write to [video1@micsem.org](mailto:video1@micsem.org). For a complete list of MicSem videos, visit our website: <http://www.micsem.org>

# SETTLING



# DISPUTES

*Francis X. Hezel, SJ*



## *Traditional Dispute Resolution*

A young man, distracted for a moment while driving his car, had accidentally struck a boy, injuring him seriously. Now a party of the young man's relatives were coming to see the family of the injured boy. Twenty-five or thirty of them were making their way slowly up the hill toward the house, the men crawling on their hands and knees, the women stooped with their heads bowed low. In the lead was an older man, who prostrated himself in front of the house. The slow procession came to a complete halt not far from the house while the supplicants anxiously waited to be told to rise and enter the meeting house. After a few minutes, someone appeared at the door, greeted them formally and told them to rise. One by one, the party entered the meeting house, depositing their burden—the sacks of rice, the basins of breadfruit, and the strings of fish they carried—on the ground. In a few minutes the formal apologies would begin, each one speaking in turn. Tears would flow, and perhaps envelopes with cash gifts would be presented to the boy's family.

This is how a formal apology was conducted in Chuuk when a member of one family caused injury or death to another. The procedure might vary somewhat from one place to another, but the essential elements were the same throughout Micronesia. Whether sakau was used in the ritual, or traditional valuables handed over instead of food, this type of occasion demanded a formal apology, compensation paid to the injured family, and a reconciliation between the two parties.

As emotionally charged as such situations were, they were the easy cases to settle. They were clear-cut inasmuch as one family had done obvious harm to another. The offending family simply had to swallow its pride and follow the script to seek reconciliation with the other party. There were other explosive situations in which each party claimed to be in the right, as when two families contested a piece of land. These disputes, which could be as emotionally



resolved in an equitable and timely fashion.

*Island Topics* presents...

## **"THE JOB HUNT...MISSION IMPOSSIBLE?"**



**The Job Hunt** is the 29th addition to Micronesia Seminar's *Island Topics* series. What kind of skills does a young Micronesia need to hold a job? In this drama, Stan, a young college dropout, finds out with the help of an invisible and, at times maddening voice that guides him on his mission.

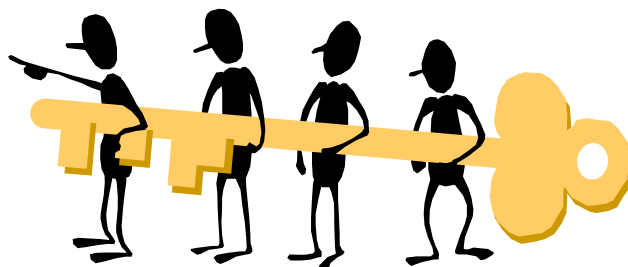


cultures.” In other words, islanders simply do not possess the same reverence for the law that Westerners hold, steeped as the latter are in the culture of law from their earliest years.

Disputes are being resolved in the state courts, but generally in a manner that pays little heed to the principles and processes that have served the islands for hundred of years. Yet the tools for adapting the modern legal system to island ways are there to be found. In criminal cases, state courts have the discretion to mitigate punishment, depending on what traditional punishment the guilty person received from his victim’s family and on agreements worked out during the traditional settlement. If such adaptation can be made in criminal cases, why not also in civil cases where they are all the more needed?

Adaptation of the state court system to island realities has never proceeded with the same intensity that the FSM national government judiciary showed years ago, although the state courts seem to be silently screaming for just such experimentation. The reluctance of judges to dispense quick judgments in the Western mode appears to underline the need for something more island-oriented. Perhaps further experimentation might produce a legal process that offers judges a way out of their impasse, while providing a fair and speedy legal decision.

More disputes than ever are coming before the courts today, and we can expect that their number will grow in the years to come as the islands continue to modernize. We owe it to the people of Micronesia to work out ways in which these disputes can be



charged as the first kind, presented more of a challenge. Even so, the dispute would ordinarily have been settled in the presence of the two families by a respected village or island leader, whose authority might have outweighed any resentment at the outcome of the dispute.

### *Growing Reliance on the Court*

Since World War II, a half century ago, the modern court system has been introduced into the islands. Now, less than two decades after independence, the modern legal system has gained wide acceptance, usurping the functions of the more traditional settlement practices, even though the traditional resonates more with island values. Today more people than ever are bringing matters to the court for resolution. Why? There are several reasons, ranging from the growing discontent with traditional practices to the increasing appeal of the new.

### *Dedline of traditional institutions*

Years ago, people would have gone to the head of the family for a decision settling a family quarrel, even one that broke out over land. Today, however, because of the breakdown of the extended family, those who once enjoyed the authority to effect this type of settlement are not available any longer. The maternal uncle who might have taken a role in this in former times now barely exercises any authority at all in most families. The same forces that tend to reduce the size of the family are also at work to fragment the unity of the local community. With increased mobility from place to place, communities are less homogeneous than they once were and leaders less widely accepted than formerly.

### *New occasions for disputes*

Many of the disputes that are taken to court today center on cash obligations—debts, commercial contracts, bankruptcy, and other such matters that have no precedents in the traditional system. These



are an outgrowth of the cash economy and modernization, and so the courts have decided that they can better be handled in the modern court system.

Land cases, which give rise to most of the disputes, show a shift in land tenure from the traditional system to new patterns. Much more of the land today is individually owned, or at least is being treated as if it were. For this reason, heads of families feel less compelled to follow traditional land inheritance practices. In Chuuk, for instance, lineage land was never divided up in the past; today, however, lineage heads are making gifts of lineage land to their own sons—a radical departure from past practice.

### *Availability of the court system*

Although the process employed in the formal court system seems more suited to large modern societies than to small island societies, it is rapidly becoming the normal procedure for handling disputes. The modern court system is visible, with its state courthouse and court officers, in a way that the traditional system is not. The modern court system is presented as the ordinary way of handling disputes of all kinds today.

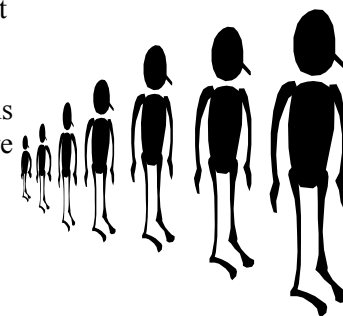
Moreover, the court system seems to be easy for disputants, especially when they can seek help from Micronesian Legal Services or free legal counsel elsewhere. As one legal aide puts it, “People can come into the office, dump their problems on the legal counsel and let them take care of everything.” They are spared the trouble of having to go through countless uneasy negotiations with their adversary, even when there is little likelihood of a settlement that both parties can live with.

Indeed, most people who come to the court for settlement usually have tried other means of settling the matter first. The formal court system is the last resort for these people. Those who are dissatisfied with judgments made at the traditional level or in the land court will take their case to the state court, especially when the dispute is over the major resources today—land and money.



In many states there already exist avenues of settlement that bypass the state court. The land tenure courts in Pohnpei are an example. Now and then a specially enterprising—or frustrated—state court justice may insist on the use of these other means of settlement. One judge on Pohnpei, for instance, took matters in his own hands by insisting that the two families appearing before him apologize to one another and work out a settlement between them in a more or less traditional manner. Another judge remanded a land case back to the land tenure court even after the parties had taken the case to the state level. In essence, he was forcing the parties to accept the decision that had been handed down in the state land court.

State courts have it within their power to send people off to work out an informal settlement under a judge who will not be hearing the case if it ever goes to court, but this assumes enough judges to handle both types of settlement without conflict of interest. In the out-of-court settlement, the judge listens to the case of both parties and picks apart the claims of each so that the two sides have a more realistic understanding of what they might expect in a formal judgment. Often, as result of this process, the parties come closer to a reasonable middle ground and find themselves ready to settle before they reach court.



### *Conclusion*

The modern court today, as we have seen, is increasingly looked to as the means of final dispute settlement. It is replacing the more traditional types of dispute resolution for reasons that have already been touched upon.

Yet, the ideology that undergirds the modern justice system is still not widely accepted in the islands today. As Brian Yamahana puts it in his book, *Understanding Law in Micronesia*, “the ideology of law has not yet become an integrated part of the Micronesian mixed



the community that the land truly belongs to him. He postpones action in the belief that the wrongful use of the land he is tolerating now will not last forever and deny his family the land that is rightfully theirs. But the doctrine of adverse possession, a key concept in modern law, may eventually deprive the man of his land unless he contests his neighbor's encroachment openly right from the start.

This dilemma is probably shared by many who function in key positions in the modern court system. Even judges with considerable legal training might hesitate to encourage a pitched battle between opponents in the court room. For this reason, they adopt the same strategy as the landowner above—they avert their eyes from what's going on and hope that the matter will solve itself in time. Cases are postponed indefinitely; key decisions are ignored time and time again. All in the hope that someone will die, after which feelings may have softened a great deal.

The gridlock of the state courts, then, may not be accidental. It may have less to do with the workload of the justices than their attitude toward handling “hot cases”—those cases that are intensely disputed. If this is so, then the delays are the instinctive response of the judiciary to ensure that the modern system doesn't override cultural concerns.

### *Small Steps Forward*

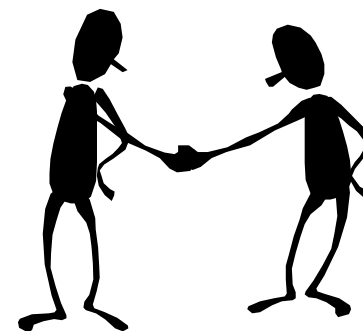
The level of experimentation with conflict resolution carried on at the national level in the late 1980s was not sustained at the state level in the years since then, following the shift of burden to the states. Nonetheless, there have been a few modest attempts by states to develop alternate routes for settlement within the provenance of the modern court system. The establishment of the small claims procedure in Kosrae is perhaps the most important of these. In this procedure parties appear without legal counsel before the judge, who resolves the matter on the spot. Over 300 small claims were disposed of in this fashion last year.



### *Courts power to make judgments stick*

The court is capable not only of making decisions, but of making the decisions stick. The judge has it within his power to issue court orders—for instance, mandating the custody of a child with someone, directing a squatter to leave a piece of land that has been ruled as belonging to someone else, or paying a certain stipulated amount each month to a creditor. This type of court order is fairly common today. Not long ago, one state court, which had issued a court order directing an individual to pay off a debt of several thousand dollars, declared the individual in contempt of court when he failed to pay off the amount he owed. The individual was arrested and put in jail shortly after the contempt order was issued.

The court can also issue injunctions forbidding persons to do certain things. In short, the court has not only the power to make decisions but to ensure that its decisions are observed, even under penalty of incarceration.



### *Shift of Burden to State Courts*

Throughout the whole Trust Territory period and during the first few years of independence, the territorial or national court handled all major cases, civil and criminal, in the islands. With its trained personnel, including judges with legal training and experience, and its more abundant resources, this court was well prepared to handle important cases demanding legal acumen. By an FSM constitutional amendment in 1991, however, jurisdiction over major crimes, even murder, was turned over to the state courts.

Today state courts handle all kinds of cases. Meanwhile, the FSM Supreme Court, for all its resources, retains jurisdiction over



cases falling into just a few categories: those in which the two parties are from different states or one of the parties is a foreign citizen; those in which a point of FSM national law is at issue; and cases in which the national government is one of the parties. The national court also handles all admiralty cases, meaning just about anything that happens at sea. In practice, most of the cases brought before the FSM Supreme Court today involve disputes between FSM citizens and banks, which are regarded as foreign entities because they have foreign shareholders.

Those who worked for the FSM Supreme Court during the 1980s recall the excitement of building a court system in a new nation. Under Chief Justice Edward King, the national court was making innovative attempts to incorporate features of the local island cultures into the new system. Nickontro Johnny and others were taking the lead in exploring alternate means of resolving disputes, putting in 60-hour work weeks as they did so. This creative period came to an abrupt end when the amendment was passed turning responsibility for most of the major cases over to the state courts.

With the shift of balance, the state courts are straining under the weight of their additional case load. The states were not particularly well prepared to assume this responsibility ten years ago, and some wonder whether they are even today. The national court can assist in training and use other indirect means to lighten the burden a little, but the brunt of the burden of making the transition to the modern legal system rests at the state level.



### *Types of Cases Heard*

Although the criminal cases that the state courts hear may be high-profile, they do not usually present as much a problem for the court as the civil cases. In criminal cases involving injury or death, the primary concern of the community is to provide adequate



judges may be acting less out of flagrant self-interest than from an instinctive island distaste for resolving a problem when passions are high.

Micronesian practice is to postpone a decision until after some of the emotional heat cools down, even if this may take years. In traditional times disputes over land might lie undecided for years until one of the parties had died and it no longer was the sizzling issue it once had been. Perhaps this is what Pohnpei State Chief Justice Judah Johnny had in mind when he publicly made his retort: “Justice rushed is justice crushed.”

### *Attempts to Cope*

The incongruities between the two systems—*island justice* as it was dispensed and the modern legal system—are real and must be admitted as such. FSM, like so many Pacific nations, is a transitional society moving towards institutions that are commonly accepted in the modern world. But it can not make this change in one great leap forward.

Even Micronesians long affiliated with the modern court system feel misgivings about the unwavering application of modern law, and the system that surrounds it, to island settings. In a paper he presented on alternate conflict resolution years ago, Nickontro Johnny attempted to preserve a place for traditional dispute resolution, even while acknowledging the legitimate role of the modern court system. Like many others, he pointed out the countercultural elements of the modern system: its confrontational nature, the win-lose nature of court decisions, the danger of intensifying rather than putting to rest the bad feelings between contesting parties.

As an example of the incongruities of the two different systems, the author uses a situation in which a family has moved on to land that is owned by someone else. He points out that traditionally the true owner of the land might tolerate the encroachment on his land to avoid direct confrontation, as long as he is assured by others in

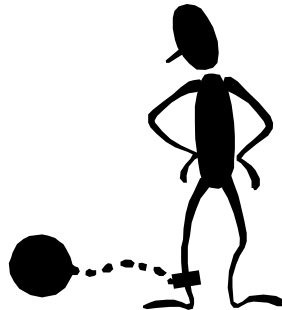


many people in their community. Personal integrity aside, why should they make themselves unpopular for the sake of upholding a government system that at times exacerbates rather than eases tensions between contesting parties?

If they steel themselves and do make such a decision, they place themselves in double jeopardy. After alienating one of the parties in a hotly contested case, they may find that their decision is overturned in the appellate court anyway. Thus, they suffer the double humiliation of becoming an outcast in the eyes of a family and afterwards of seeing their decision judged inadequate. In the eyes of the presiding judge, the hostility they incurred is compounded by the shame of having made the “wrong decision.”

Sometimes less noble motives are attributed to the judges. Some Micronesians feel that the ubiquitous force of politics gets in the way of expeditious decision-making, making the judges much less impartial than they should be. These critics charge that judges will push through cases in which their friends will win, but slow down cases in which their political allies and friends stand to lose in court. They claim that some judges avoid unpopular decisions and seek to ingratiate themselves with the people because they aspire to political office at some future date. One or two judges have been accused outright of taking bribes.

Even without subscribing to these less flattering interpretations, we can hold that state court judges are acutely conscious of how many and whom they may offend through their decisions. They can not help but be sensitive to the dead cats and the piles of stones left outside their houses in an attempt to influence their decisions.



But there is another way of viewing the matter. The long delays before handing down court decisions, the cases tied up in court for months or even years, might serve another purpose. Many times the



satisfaction for the injured party and to work out a reconciliation between parties. In civil cases, on the other hand, parties come prepared to dispute one another’s claims on the truth of the matter. Civil cases, especially disputes over land, are usually bitterly contested.

The civil cases that are usually brought to court for settlement include land disputes, suits for breach of contract, claims for payment, and minor matters such as adoption and name changes. While the smaller, more routine matters can be disposed of quickly, most of the civil cases that come before the state courts are disputes on land and claims for money owed. Because such cases deal with the two major resources—land and money—the contesting parties usually enter the ring prepared for brutal combat.

Often enough the parties have tried to resolve these disputes in other ways before bringing them to court. Land cases will often go before the land commissioners, or sometimes be taken to a community leader for mediation. Invariably, however, one of the parties will be dissatisfied with the outcome and decide to bring the case to the state court. If the judgment is still unsatisfactory, the case may be taken to the court of appeals.

### *The Slow Pace of Justice*

The states have a larger case load today than ever before. Pohnpei handles about 20 civil cases each month, in addition to another 25 to 30 criminal cases, for a total of 45 or 50 cases (not counting the minor traffic cases, which number another 30 or so a month). Chuuk, despite its much larger population, appears to have a comparable caseload. The state court there handles an estimated 35 civil cases and 15 criminal cases monthly, or 50 cases in all each month.

With five judges sitting in the Pohnpei State Court, the workload per justice is an average of perhaps ten cases a month. In Chuuk, with four judges sitting and one vacancy, the average monthly load is about 12 cases. The smaller states are presumably





better off than either of these states. The caseload may have grown since 1991, but so have the number of judges and staff members.

In the larger states people frequently complain about the long delays in passing down decisions. One attorney who does work throughout FSM complains that state judges will often delay ruling on a motion for between six months and a year. A nine month delay in such rulings is the norm, he says. As a consequence, there is a huge backlog of cases. Some land cases have been in court for years without settlement. Indeed, the long delays present such a problem that the Pohnpei legislature is threatening to take drastic measures to deal with it. Independently, the legislature in Chuuk has been talking about introducing a law setting a time limit within which court judgments must be issued.

Administrative problems may account for some of the delay. Pohnpei State Court has only one clerk who is expected to write up all the decisions. Moreover, the court has only a single copy of case files rather than two. Hence, when one of the judges has taken out the files to consult them, no one else can use them. Some of the judges also travel quite a bit and are unable to preside at scheduled hearings. Cases pile up on their desks, sometimes for months at a time.

When hearings are postponed long enough, cases have a way of settling themselves. Key witnesses die, one of the contesting parties may move away, the case is settled by default.

### ***Justice Delayed***

“Justice delayed is justice denied,” as the old legal adage puts it. Parties who bring their cases to court deserve a timely decision. Failure to resolve the matter expeditiously is seen as an infringement on their rights to a speedy resolution of their case. Yet, at present, many seem to be complaining that such timely resolution is not afforded in the state courts.

One attorney made a more pragmatic case for speed in the



judicial system on the grounds that the more expeditiously cases are moved along, the greater chance for settlement. The proximity of a date of judgment forces the parties to sharpen their thinking on their case, he argues. As the date approaches, the contesting parties often become more, not less reasonable. Long delays, on the other hand, only serve to harden people’s positions. Working out settlements on the steps of the court house is not just an old wives’ tale, he says. He and others like him feel that, contrary to the present practice, there should be automatic come-up dates for cases.

**“Justice delayed is justice denied”**

**BUT...**

The present benches in the larger states of Pohnpei and Chuuk, with five judges in the former and four in the latter, should be able to handle the caseload they have. The claim that a heavy workload is forcing judges to postpone cases seems unconvincing to many, including legislators in these states. Critics, therefore, cast about for other explanations for the long delays.

The judges are all Micronesians and, whatever their legal training, they remain Pacific islanders to their core.

The cases they handle involve real people in their communities with personal backgrounds and family histories that are well known to the judges. The presiding judges are more likely to ponder the impact of their decisions on the people who stand before them in court than they are to contemplate the abstract standard of justice that ideally imbues the thinking of Westerners. Like anyone else in an island society, the judges would prefer to wiggle out of making a tough decision that they know will invariably alienate

