The High Court of the Trust
Territory of the Pacific Islands

The author of this article, The Honorable Philip R. Toomin, a member of the Law School Class of 1926, engaged in the private practice of law in Chicago prior to his appointment as Associate Justice of the High Court of the Trust Territory. At the invitation of the Record, he has provided us with this description of the organization and work of his court.

Five thousand miles west of San Francisco sits an unique court of the United States, carrying on its daily business despite conditions of discomfort, hardship, and occasionally peril. Its territorial jurisdiction is probably the largest in the world, and its jurisdictional subject matter practically unlimited. People who come before it speak nine languages, none except their own being intelligible to any of them, and none being intelligible to any member of the court.

No appeal lies from the final decisions of this tribunal, nor is it bound to accord more than polite recognition to the decisions of the United States Supreme Court. Moreover, in order to become a working member of this court, it is necessary to pass the United States drivers’ road test, since the only method of transportation on land is by truck or jeep. This exposes the court to the charge that its opinions are prepared by truck drivers. While this is in a sense true, it is hoped they also reveal some influence of the legal scholar.

Half of the year is spent by the two justices in circuit-hopping to the various judicial centers in an area of some 3,000,000 square miles of water and 657 of land. Travel is by plane, by freighter, launch, and jeep; if necessary, it would be by outrigger canoe.

This court is known as the High Court of the Trust Territory of the Pacific Islands. These islands are those formerly mandated to Japan, in the Mariannas, Marshalls, and Carolines groups, now under United States Trusteeship. They fan out to the southwest and southeast from Guam, which is the administrative center of the administration, though not included in the trusteeship. Included are famous battlegrounds of World War II such as Saipan, Peleliu, and Kwajalein, and the scenes of atomic bomb testing at Eniwetok and Bikini.

One of the sources of irritation in the relations between the United States and Japan in the 1930’s was the persistence of the latter in fortifying these islands in violation of its mandate from the League of Nations. It will be remembered that one of the first acts of Japan, after its declaration of war against Germany in 1914, was the seizure of these islands.

Upon confirmation by the League of its control as mandatory power in 1920, Japan undertook to incorporate the islands into its economic orbit. Its control was complete and direct. Administrators from Japan took over direction of political and economic affairs, with comparatively few posts being allocated the island populations. Production of crops was geared to the needs of Japan’s expanding economy, and colonization went on at an accelerated pace, until finally many of the principal islands counted more oriental migrants than indigenous inhabitants.

After 1935, when Japan withdrew from the League of Nations, its economic control over the islands was broadened in keeping with the needs of its military machine. Many of the fine harbors and their approaches were fortified, airstrips were installed, and the principal islands dotted with military installations and supply depots.

In 1944, the roll back of Japanese colonization and development started with the United States invasion of the Marshalls, and terminated with surrender of the Palau group the following year. As each island group surrendered, its administration passed to the Department of the Navy.

Initially the only administration the Navy was authorized to establish was strictly military, in accordance with the international law of belligerent occupation. The legal system applied was that of the military government, with law and order enforceable by the military forces, and only such civil rights recognized as accorded with the needs and views of the military authorities.

After creation of the United Nations, however, the situation changed, with the acceptance by the United

Continued on page 42
States of trusteeship over the islands. Under Chapter 11 of the Charter of the United Nations, provision is made for the assumption by members of the administration of territories, whose people have not yet attained full self-government. Under such provisions, members agree to accept as a sacred trust, the obligation of promoting the well being of the inhabitants of such territories.

In pursuance of the national policy of maintaining these islands within our sphere of influence, Congress, on July 18, 1947, authorized assumption of the trusteeship. By the trusteeship agreement, termination of Japanese control was recognized, and the United States named as the administering authority. Under it, the United States assumed the obligation of promoting the economic advancement and self-sufficiency of the inhabitants; of protecting their civil rights and fundamental freedoms, without discrimination; of fostering and developing a general system of elementary education, and the pursuit of higher and professional education as well. It also agreed to promote the self government of the people in accordance with their expressed wishes, and to give them an increasing share in the administrative services in the territory. And lastly, it agreed to provide a system of law which would give due recognition to the well recognized native customs of the inhabitants.

Upon approval of the Trust Agreement by the Security Council, the President directed the Navy Department to provide, on an interim basis, appropriate administration to implement this country's obligations under the Trusteeship Agreement. It was no longer possible to operate the machinery of government through military directives backed by Navy guns. It was now necessary to set up a government operating under civil rules of administration, with the branches of government and their powers adequately delineated, a system of laws established, and a judicial branch established in order to interpret and enforce those laws.

The administrative head of the new government named by the President, was the Commander-in-Chief of the United States Pacific Fleet, who was given the title of High Commissioner. To his subordinates was assigned the task of preparing the necessary draft of a bill of rights and constitution, as well as a new legal system, tailored to the needs of this far-flung aggregation of communities.

The sea-going lawyers proved to be as adept at initiating a formal civilian government as they had been in administering its military predecessor. In short order they hammered out a series of directives which
were adopted by the High Commissioner as the basic framework of the new system of laws. They took the shape of a bill of rights and a series of regulations covering the division of powers and duties of government and its sub-divisions, as well as a code of crimes and criminal procedure, and provisions for judicial procedures and law enforcement.

When their task was completed, they had prepared a series of interim regulations of some eighteen chapters, of which Chapter I was the Bill of Rights, setting up the framework of a system of government (its constitution), together with the statutes designed to carry into effect this constitutional system. A later chapter was added with respect to communications, so that the entire scheme of government, as well as the statutes designed to implement the powers delegated, was finally compressed into 19 chapters, divided into some 1,204 sections, and running slightly over 139 pages of text.

Before one becomes lost in admiration at this apparent example of concise draftsmanship, yet it be noted that there are a number of ready answers. First, we are dealing with a society which, though not primitive, is far below the complexity of western civilization, and up to this time has required only relatively limited application of the principles and practices incidental to modern business, finance, and government.

Second, it is possible to adopt other legal systems by a few apt words, thus dispensing with the requisite detail where each provision is to be set forth with particularity. As will be seen, such is the case here.

And, third, where not restricted by constitutional limitations, as here, broad powers may be delegated to administrators, and considerable discretion allowed in the exercise of these powers. Although this pattern is not to be described as markedly democratic, it is nevertheless completely workable.

These interim regulations adopted by the Navy, and as amended from time to time, continued as the sole body of law applicable in the Trust Territory from July 18, 1947, until December 22, 1952, approximately a year after administration of the Territory had passed from Navy, and become vested in the Department of the Interior. That Department appointed a civilian as High Commissioner, who, in 1952, by proclamation adopted these interim regulations as the official Trust Territory Code of Laws.

In a foreword to the printed code which accompanied the proclamation, the then High Commissioner, former Senator Elbert D. Thomas, had this to say:

"On this wisdom of our two American judges to appreciate law as a growing organism, and on the ability of our more than 100 Micronesian judges to overcome the forces of the past and rule in accordance with law, will depend the ultimate success of attaining our objectives."

It may be of interest to take a quick look at this code to see why its successful administration depends so largely on the wisdom of the two American judges. As above stated, Chapter 1 consists of a Bill of Rights. There are 14 sections, 10 of which are adapted without significant change from the first 10 amendments to the Federal Constitution. Of the 4 additional, one guarantees freedom of migration and movement within the Trust Territory; a second assures free elementary education throughout the Territory; a third permits the High Commissioner to restrict ownership of real property and business enterprises to citizens of the Trust Territory; and the last requires due recognition of local custom in providing a system of laws.

Chapter 2 undertakes to designate the laws and legal systems applicable in the Trust Territory. It repealed all the Spanish, German, and Japanese laws theretofore adopted, and provided that the following were to have the effect of law: (a) The Trusteeship Agreement; (b) such laws of the United States as shall by their own force be in effect in the Trust Territory; (c) The Trust Territory Code; (d) District Orders promulgated by the District Administrators of Trust Territory, with the approval of the High Commissioner; and (e) duly enacted Municipal Ordinances.

Recognition of local custom was assured in a section providing that customary laws not in conflict with the laws of the Trust Territory, or those laws of the United States in effect therein, were to have the force of law in matters to which they were held by the courts to be applicable.

The further proviso was made that the common law of England, as it existed on July 3, 1776, and as interpreted by American decisions, was to be in effect in the Territory, except where local land law was in conflict therewith. An express provision also appears that the laws governing ownership, use, inheritance, and transfer of land, in effect in the Territory December 1, 1941, were to remain in full force and effect, except where changed by written enactment under the authority of the Trust Territory Government.

Due recognition was given to the desirability of amending the Code from time to time, by a provision that such could be done through Executive Order promulgated by the High Commissioner. Thus, it can be seen that the legislative power is lodged primarily in the High Commissioner, secondarily in the District Administrators, and finally in the municipalities created under the authority of the Code. It can also be seen that there has been created a hybrid legal system in which there has been engrafted on the common
law, a wealth of native customary law developed over the centuries in a society where land is the truly basic resource. As may be surmised, this imposes a substantial burden on those charged with the duty of determining which rule of law is applicable to a given set of facts.

For the purposes of this paper, no other chapter of the Code needs discussion save the article relative to the judiciary. Under it the judicial power is vested in a High Court for the entire Territory, a District Court for each administrative district, and a Community Court for each municipality. The High Court is a court of record, and has both a trial and an appellate division. The Trial Division consists of the two judges named to the court, and the Appellate Division consists of the judge whose judgment is not being reviewed on appeal, and two judges from a panel named by the Secretary of the Interior for the purpose, from those sitting in the Island Court of Guam. The High Court has original jurisdiction of all cases originating in the Territory, civil and criminal, as well as probate, admiralty, and maritime. It is not required to, and usually does not, accept jurisdiction over causes which are within the jurisdiction of the inferior courts. Its Trial Division has appellate jurisdiction of all decisions of the District Courts, and the duty to review on the record all final decisions of both District and Community Courts where no appeal has been taken.

This review provision of the Code was inserted in order to expose the trial practice of the lower courts to the scrutiny of the High Court for the purpose of assuring that substantial justice was done. Though the Code authorizes the reviewing Justice to reverse and remand any judgment believed by him to have been entered erroneously, even though no appeal has been taken therefrom, in practice the review procedure is utilized by the reviewing Justice to point out palpable error and suggest appropriate change.

In addition to this review procedure which though onerous, serves a highly useful purpose, further appellate jurisdiction inheres in the Appellate Division of the High Court, to review on appeal, all decisions in cases tried by the Trial Division and in certain cases heard by that division on appeal or review of decisions of the lower courts.

District Court judges are named by the High Commissioner, usually upon recommendation of the Chief Justice of the High Court, but are removable by the High Court for cause and after hearing. The number of judges assigned is based on the amount of judicial business in the particular district. District Courts have original jurisdiction over civil causes involving claims of property not exceeding $1,000.00 in value, excepting admiralty and maritime matters, and adjudication of title to real estate; and jurisdiction over criminal cases where the maximum punishment does not exceed a fine of $1,000.00, or imprisonment for one year, or both. Each District Court has appellate jurisdiction over all decisions of the Community Courts, civil and criminal.

Community Court judges are appointable by the respective District Administrators, and removable by the High Court for cause and after hearing. Jurisdiction is limited to civil cases where the values involved do not exceed $100.00, except admiralty and maritime matters, and adjudication of title to land, and criminal cases where the maximum punishment does not exceed a fine of $100.00, or imprisonment for 6 months, or both.

Further provisions appear whereby the High Court may require any case pending in the inferior courts to be transferred to it for further proceedings; also delegating to the Chief Justice administrative supervision over all the courts of the Trust Territory and their officers, with the power to make rules regulating pleading, practice, and procedure in the various courts, and the conduct of business therein. The Chief Justice is also empowered to appoint and remove the Clerks of Courts for the various districts, as well as all other court employees, provided that native inhabitants are to be employed as judges, clerks, and employees to the maximum extent consistent with good administration.

Provisions appear with respect to judicial procedures
in the enforcement of extra ordinary remedies, such as attachment, execution, and levy on property, habeas corpus, and the commitment of insane persons; also with respect to criminal procedures in the matter of process, search and seizure, bail, and the protection of fundamental rights of the accused. These are similar to procedures set up by the statutes of the several states. They are supplemented by a series of rules of civil and criminal procedure promulgated by the Chief Justice, adopting certain portions of the Federal Rules of Civil and Criminal Procedure.

Accordingly, it can be seen that insofar as is apparent from the provisions of the Trust Territory Code, and of the Rules of Civil and Criminal Procedure, the courts of the Territory have to same basic legal background, are called upon to enforce, in general, the same civil rights and use, on the whole, pretty much the same techniques and procedures as are employed in similar situations within the United States. There are, however, several basic differences, which result in imposition on the judges of the High Court, of responsibilities, duties, and discretion more demanding than those required of conventional Federal judges.

In the first place, territorial trials are not held before juries. The standard of general education in Micronesia, though constantly improving, is still far below the level needed to assure adequate deliberation by the ordinary resident on issues of fact. Local influences are particularly strong where the clan and lineage system operates, and the impact of foreign cultures too recent to permit of even a moderate use of this trial method. Accordingly, a judge has the burden initially of acting as his own jury, and after determining the facts, of applying to them the relevant legal principles.

Second, in nearly all civil cases the parties are without the aid of a professional bar in the drafting of pleadings, motions, and other documents, and during the trial. Customarily they appear with some trusted advisor, who undertakes to present the testimony and such argument as his understanding of the issues will permit. This imposes on the High Court the necessity of questioning each witness for both sides rather extensively in order to be sure that the record contains all the essential facts. The court has great latitude—and exercises it—in adjourning trials until some essential testimony may be forthcoming which the parties have neglected, or for the purpose of examining the site where land or other disputes are involved. But the most important weapon in the judicial arsenal is the pre-trial conference, and its usually resultant order. This conference is set by the court early in its sitting, and the parties and their advisors are invited to present their respective theories of the case. The court then strives to obtain the necessary background of the case

and agreement on matters not in controversy. In an order there is then stated the contentions of the parties, the agreements reached between them, and the issues remaining to be resolved by evidence at the trial.

In this manner the court is able to eliminate all but the essential evidence and to center the parties' attention on the real matter at issue. A vast amount of court time and effort is thus saved, and the handling of judicial business expedited. However, the burden thus imposed on the court is substantial, as the drafting of the pre-trial order is frequently onerous; and convincing the parties that the order adequately protects their interest, involves a considerable amount of salesmanship, particularly in the light of the language barrier. It may then be stated that the lack of a trained professional bar adds enormously to the duties and responsibilities of judges of the High Court, and in this respect their lot is far less happy than that of their brethren with the heavier robes.
It is an axiom of human conduct that everyone espouses a just solution to controversy, provided it is in his favor. Since the court *ex hypothesi* desires in each case to achieve substantial justice, and since the parties are mainly interested in achieving their own ends, the parties have developed the practice of using what are known as Trial Assistants. These assistants are usually present or former Assistant Public Defenders, who have become somewhat familiar with the court rules and procedure, and have acquired some understanding of basic legal principles. By court rule, these trial assistants have been given status before the courts and have become amenable to court disciplinary action. It is hoped the use of trial assistants will increase until the advent of a trained professional bar, of which there is as yet but the faintest glimmer on the horizon. How comforting it will be to High Court judges of the post atomic age to doze gently in their courtrooms while pretending to listen to the learned argument of counsel. And how pleasant to be able to examine with practiced eye the orders prepared by counsel, noting merely whether they contain the essential facts and judicial prerequisites.

This leads to the third point of difference between practice in the Trust Territory and in stateside courts. It follows from what has been said hereinabove that in all civil cases, all orders, and much of the record of the proceedings, are prepared by or under the supervision of the trial judge. In addition to the pretrial order, there is the final judgment order containing findings of fact and conclusions of law. If there is an appeal, the record of proceedings is typed by the court reporter and submitted for examination to the trial judge, who makes any necessary revisions, then certifies it, and sends it on to the appellate tribunal with the exhibits and the common law record. All that the party, or his trial assistant, customarily does is to present a brief and argument, although this is not essential to a consideration of the appeal by the appellate court.

What has been said above does not apply in its entirety to criminal trials. Here we have a territory-wide District Attorney, who presents all felony cases to the High Court in the districts of their origin. These cases are defended by a Public Defender, he and the District Attorney being professional lawyers recruited from the American bar. They have assistants in each district, who are qualified to present and defend misdemeanors before the District Court judges, and to prepare the necessary complaints in all cases in the absence of the District Attorney.

However, all orders in criminal cases, the report of proceedings, and the record on appeal, are prepared under the direction of the trial judge. He does not take such a dominant part in the conduct of criminal trials, as there is adequate representation of both parties to assure presentation of essential evidence. However, he frequently examines witnesses and takes upon himself the responsibility of determining that the fundamental constitutional rights of the accused have not been violated, particularly where the introduction of a confession is sought by the prosecution. Great pains are taken by the trial judge in pronouncing sentence to make sure the defendant understands the purpose of the punishment, as well as the factors considered by the court in determining sentence. It is a cardinal principle of the High Court that it is not only essential to do substantial justice in each case, but that the people generally, if not both litigants, recognize as such.

The final distinctive difference in practice between Stateside courts and those of the Trust Territory, is in the impact of customary law in the Territory. First in the Trusteeship Agreement, then in the Bill of Rights, and finally in the Code, it was recognized that the customary law in existence in various parts of the Trust Territory, in matters to which it was applicable as determined by the courts was to have the full force and effect of law, to the extent not in conflict with the written basic law formalized in the Code. Though the common law was made generally effective in the Trust Territory, it was provided by exception thereto, that it would yield to recognized local
custom. In addition, an express provision was inserted in the Code concerning land law as hereinabove described.

The impact of customary law upon the otherwise common law of Trust Territory can be measured when it is realized that in practically all of the districts, in addition to the customs in force governing ownership, use, inheritance, and transfer of land, there are well recognized customs having the sanction of law, in marriage, divorce, adoption, and wills.

When to the foregoing is added the further qualification that the customs differ not only from district to district, but occasionally from municipality to municipality of the same district, it becomes obvious what a headache this matter of customary law may present to the casual jurist. So important is the impact of custom on litigation generally, that by Code provision and rule of court, the courts are permitted to avail themselves of a local expert called an “assessor,” who is usually a District Court judge, and who sits alongside the trial judge and is permitted to ask questions of the witnesses to the same extent as counsel and the trial judge. While the parties are invited to present their own evidence as to custom, it may be assumed that the advice of the court’s expert shares importantly in the court’s decision.

These are the principal differences in practice between Stateside courts and those of the Trust Territory. However, let it not be assumed for a moment that they tell the whole story. There is more to the transaction of judicial business in the Trust Territory than conducting a pre-trial conference, or presiding at trials. It is quite different here from the occasional peril of travelling by taxi from a federal judge’s comfortable apartment on the near-north side, to his well-equipped chambers and imposing courtroom in the United States courthouse.

Our High Court justices travel from district to district as often as judicial business requires, in amphibious planes carrying not over 15 passengers, and up to several thousand pounds of freight. Water landings are made in three of the districts, and on land in the other three. In two of the districts where the plane comes to rest on the surface of the lagoon, it taxis to a sea ramp up which it waddles and then comes to rest for discharge of passengers and freight and refueling. The passengers then leave for their hotel, either by launch through the tricky three mile channel at Pinape, or by jeep several miles across the causeway to Koror Island in the Palau group. In the third district which requires water landings, Yap, there is no sea ramp, so that the plane must tie up to a buoy in the harbor and discharge passengers and freight onto a waiting barge, which transports them a half-mile or so to the pier. In all of the districts where water landings are employed, it is necessary for a launch to sweep the ‘runway’ to be utilized by the oncoming plane, of any debris which might become a peril to its fast approach or departure. It is a thrill, which is never dulled by constant repetition, to take off in these comparatively small planes, fly from 500 to 800 miles of ocean, and unerringly find one’s way into the relatively calm waters of the target lagoon.

Where these planes land on an airstrip, their ex-bomber pilots usually waste no time in preliminaries, such as circling the air field or banking to reduce speed. One of them comes in exactly as he used to do on the deck of a carrier, with a sudden descent and no apparent slackening of speed. Nor is the take-off at daybreak on a rough coral runway entirely conducive to pleasant digestion and peaceful slumber.

Added to these perils is another from which stateside judges are relatively free, namely the malevolent use of magic. In criminal cases, High Court judges are unfortunately subject to an occasional “hex” which is used to ward off an adverse decision. In a recent trial at Yap, the accused employed a “sure” method of inserting such confusion and uncertainty into the judicial mind as to preclude an unfavorable decision. This he did by tearing leaves into small bits and scattering them along the road from the judge’s quarters to the
courthouse. Unfortunately for the accused, this jurist had been in such a chronic state of confusion induced by a study of some involved native customs, that the "hex" had relatively little effect. Accordingly this magician now sits in a cool cell wondering what could have gone wrong, as he serves the sentence imposed on him by the confused jurist.

When he travels to the various districts, the High Court Justice is usually met by a delegation consisting of District Judges, the Clerk of Courts, and local prosecutors and public defenders, from whom he will get the latest news concerning readiness of cases on the trial call. Later in the day he will visit the courthouse and groan over the inadequate facilities, for it is a deplorable fact that construction or renovation of courthouses is on the public works agenda far behind the necessary expansion of hospital facilities and construction of schools. This is why it is such a pleasure to sit in the new courthouse at Koror, where the almost completed building is so attractive as to have earned the sobriquet, "Taj Mahal."

However, conditions are constantly improving, and as funds are made available by Congress, serious deficiencies are being alleviated. In its operation of the Trust Territory the United States has amply demonstrated that it has taken to heart the objectives of the Trusteeship Agreement. Signs abound that the native populations are showing a marked advance in health, education and civilization, and a steady improvement in economic well-being. In all this the United States can take a justified pride, as can the many dedicated staff members who man the necessary facilities.

Americans coming to Micronesia and rendering significant service in the fields of medicine, law, education, and public health, are deservedly held in high esteem by the native populations. Those having the appropriate professional background and the stimulus towards the experience of living among and working with the eager natives, will find their lives in Trust Territory rich in reward. They will be disappointed, however, if they expect this reward to come in the shape of a beautiful hand maiden sent by her tribe to grace the home of the altruistic worker. The writer is constrained to sadly admit, that though he has toiled for some time on the outlying islands in a position of responsibility and power, no such experience has as yet befallen him.

The Law School Record
A Quarterly Publication of the
University of Chicago Law School
Chicago 37 • Illinois

Local photos by Stephen Lewellyn