Federated States of Micronesia Health Services in Relation to Medical Services

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Introduction

The Federated States of Micronesia (FSM) is a small country with an approximate population of 100,000 people. A great deal of the population relies on a public health care system that is controlled and regulated by the state governments (Yap, Pohnpei, Chuuk & Kosrae). The present health care system in the FSM has three levels: the community dispensaries, the state hospitals, and referral to hospitals outside FSM. [i] The referral program reflects the shortfall of medical doctors and equipment, which has caused the FSM people to rely heavily on their respective state governments for free health services. Because, many people believe that the law confers an individual right to health care, the misconception that the state governments bears the duty to finance tertiary health care is overwhelming. [ii] This belief may have stemmed from an adaptation of the Trust Territory administration, during which US was responsible for the cost of all medical referrals treated at the naval hospitals in Hawaii. [iii] Currently, the government denounces the assertion that there is a "right to health care" and because of such right the public hospitals have a duty to finance treatment of medical referrals.

Today, there are many FSM citizens that are still confused about the role of the government in relation to tertiary health services. Complaints and disgruntled spirit of the public is seemingly increasing and possibly may lead to a controversial legal bout between the public and the government. It is therefore imperative that the FSM people be informed of their medical referral programs specifically whether the law compels public or state hospitals to pay for the medical treatment of referral patients. The task of this paper is therefore to inform the people of FSM precisely what the law is in relation to financing of tertiary health and the significance of why the law is the way it is today. Thus the question that arises is *whether or not there is a "right to health" in FSM and from such right whether there is a duty by the state governments to finance offshore medical referral treatment?*

Scope of this Paper

To foster a comprehensive understanding of the task of this paper, and simultaneously facilitating a simple and coherent answer to the main issue of this paper, the substance of the paper will be outlined in the following manner: first it will give a brief history of FSM and the commencement of the referral programs to illustrate the factual background of the controversy between the people and the government. Then, in trying to answer the issue above, the paper will identify and examine the relevant FSM laws. From a thorough scrutiny, the paper will first unravel the legal position between national and state laws to determine; 1) whether or not there is a right to health care in FSM? 2) Whether the state hospitals have a duty to provide health care to medical patients? Subsequently, the paper will determine whether such duty is extended to free tertiary health care or services. Next, the paper will identify the often popular justifications for imposing or establishing a duty for the government to pay for offshore medical referral treatment. These justifications will be discussed and critically analyzed to determine whether they are legitimate. The paper will also highlight practical legal constraints and local factors that hamper the notion that the law should be changed to confer a right to health care. Finally the paper will conclude by

explaining why the law is the way it is and how it fits the current circumstances of the FSM and serves the interest of the FSM people. The paper will focus mainly on the state of Pohnpei and Kosrae.

Shaping of a Nation

A little history of FSM is necessary to appreciate the instigation of its medical referral system and why it is a controversy today. The Federated States of Micronesia (FSM) is one of four distinct political entities to arise out of the United States administered Trust Territory of the Pacific Island (TTPI). [iv] The TTPI was supervised by the United States, through its department of Interior, under the United Nations Trusteeship system. The TTPI was the last remaining of the trusteeship established by the United Nation after World War II. After over a century of foreign domination-successively under Spanish, Germans, Japanese, and Americans [v] -the people of Micronesia finally gained political independence on November 3, 1986, as a new nation in the international community. [vi]

FSM is composed of four states, named after their main islands, and dozens of atolls extending over a large area of the north central Pacific. The four states are: Pohnpei (formerly Ponape), Kosrae (formerly Kusaie), Chuuk (formerly Truk) and Yap. The federal capital is located at Palikir, on the island of Pohnpei and close to its largest city, Kolonia. The FSM is a constitutional democracy, and it is party to a Compact of Free Association with the United States. Each respective State has its own government and runs its own state hospital.

Beginning of a Medical Referral System

According to the Administrator of Kosrae Health Services, the history of the present health care system has its roots in the early US naval administration after World War II. [vii] Although Public health services actually started earlier during the reign of the Japanese administration, it was not until the US takeover where health development starts taking shape in the Pacific Islands. Health development was in a sluggish pace at first. The first signs of development were seen in the improvement of the human resources and the participation of the local people in health programs. For instance, the first crop of Micronesian medical trainees was sponsored by the US Navy to train as medical and nurse assistants in Guam. [viii] But during those early years, there were no hospitals and no medical referral system.

A radical changed occurred during the early 1960s when US became intolerant with the United Nations' continuous reports that progress in the Trust Territory was slow. [ix] Slim budgets were augmented to several times what they had been. The US after assuming the responsibilities to provide basic health care that was once the local communities' had started constructing new dispensaries. [x] Responsibility shifted from the community to US government for providing local health care. [xi] The US government paid all the bills; it hired and supervised the local medics, while the community, relieved of this burden, could stand by and watch. The US government built hospitals on a larger and more modern scale. After all that development, US realized that the Micronesian people were still substantially deprived of proper medical diagnosis and treatment. In light of this predicament US initiated a Pacific Island Health Care Program where patients were sent to Tripler Army Medical Center in Hawaii for appropriate medical care and services. [xii] Every Year, the United States Congress appropriated funds to run this program, which was later coined as the *"medical referral program*". [xiii]

After independence, FSM adopted the program to become part of the state government health care. However by the early 1980s, it became clear that the young nation could no longer afford such a costly health care system. Instead of terminating the medical referral system, FSM tried to trim its expensive structure in other areas. Pohnpei and Kosrae closed dispensaries at that time to save money. Pohnpei, while keeping its five outer island dispensaries, reduced the number on the main island from 20 to three.

Kosrae shut down all three of its dispensaries. The states did not terminate their referral programs but they tried to work out a reasonable way to limit the rapidly expanding costs of medical referrals abroad. Perhaps, part of the reason why FSM maintained the referral system was due to the continuous flow of financial and technical support from the US for the referral program. [xiv] Currently, the referral program exists as a major component of each of the FSM State's health care system.

Free Health Services an Adaptation

After the termination of the Trust Territory of the Pacific Island, the United States left with a public misconception *–it is the government's duty to fund offshore medical referral treatment* - that was deeply inscribed in the people's belief. [xv] Since then FSM has struggled with this inherited misconception. Presently, the public misconception lingers with a stronger assertion – *there is a right to health and the state governments' duty to fund offshore medical referral treatment is ancillary to that right.*

The local communities have become accustomed to free medical health services. People in FSM have not yet become habituated to paying for the medical services they receive from the government. It is just recently that private medical clinics evolved but even so there are only few of them. For instance, there are only two in Pohnpei but none in Kosrae. The majority of the population relies on the state government to provide health care services and expects these services to be free. This notion of free services is reflected in the small amount of fees collected for visits to the hospital and dispensaries.
The fees collected amounted to no more than ten percent of the total health costs of services. [xvi] People in FSM commonly believe that health care is a legal right and by way of that right it is a government's duty to provide for such right. [xvii] Incidental to the right to health, as claimed by many, arises a duty of the state to government to pay for medical referral treatment. State governments, on the other hand, deny the existence of such right and duty. Thus the question that arises whether or not there is a "right to health" in FSM and from such right whether there is a duty by the state governments to finance offshore medical referral treatment? The laws of FSM must be reviewed to determine the issues above.

National laws

FSM Constitution

The Constitution of Federated States of Micronesia speaks of a right to health and a government duty to provide health services to the citizens of FSM. Article XIII (1) of the FSM Constitution states:

The national government of the Federated States of Micronesia recognizes the right of the people to education, health care, and legal services and shall take every step reasonable and necessary to provide these services. [xviii]

Article XIII is often referred to as the Professional Services Clause for the FSM government. There is a case that seems to convey that the FSM Supreme court recognizes a right to health in FSM. In *Leeruw v. FSM* [xix] , the court considered the vicarious liability of the national government for the negligent actions of the FSM liaison office and its staff in Guam, on grounds that the office failed to arrange for transportation of an incapacitated FSM citizen from Guam to Honolulu for medical treatment. In this case, Leeruw, a 19 year old, had problems with her artificial heart valve. Yap State hospital decided to send her off-island for replacement of her heart valve. She was first to be sent to Guam for stabilization, and then moved on to Honolulu for the replacement of the heart valve. By law, the national government through FSM Liaison Office in Guam assumes responsibility to provide medical referral assistance to FSM citizens in Guam. In reliance upon this liaison office policy, Yap state officials sent Leeruw to Guam. When she arrived in Guam, officials from the liaison office met her and immediately took her to the Guam Memorial Hospital for stabilization. After examination, Leeruw's doctor in Guam advised that Leeruw be

sent off immediately to Hawaii on the first available flight because her condition was deteriorating. Unfortunately however, arrangements for Leeruw's flight to Honolulu did not proceed apace. Yap had issued a round trip ticket between Yap and Guam but there was no ticket for the flight to Hawaii. The liaison office was aware of this problem but did not take any immediate action to obtain a ticket for Leeruw's flight to Honolulu. Leeruw missed the earliest available flight to Hawaii. She died in Guam Memorial Hospital while waiting for the next available flight.

Leeruw's parents sued the Yap state hospital and National Government for action in wrongful death action. Yap State made a settlement with the plaintiff and was dismissed from the action. The question that went before the court was whether the liaison office, and hence the national government, owed a duty of care to Leeruw? The court ruled:

There can be no question that the liaison office owed a duty to Ms. Leeruw. Acting pursuant to statutory authorizations and administrative directives, the national government has caused the FSM liaison offices to assume responsibility for providing medical referral assistance to FSM citizens. In reliance upon this liaison office policy, Yap state officials sent Ms. Leeruw to Guam, thus rendering her dependent upon the assistance of the liaison office. [xx]

More importantly is the court's response to the defendant's claim for sovereign immunity defense. The court responded in pertinent part:

...In the Professional Services Clause of the Constitution, the national government recognizes the "right of the people" to "health care" and pledges that it "shall take every step reasonable and necessary" to provide such service. FSM Const. art. XIII, § 1. The clause surely demands consideration in a case such as this where plaintiffs claim, in essence, that the national government did not take the "reasonable and necessary" steps for Ms.

Leeruw's medical referral and that she was thereby deprived of her "right...to...health care."... [xxi] *(Emphasis added).*

The plaintiff was awarded judgment against the FSM national government in the amount of $36,600.00. It is not really clear whether the court's decision in *Leeruw* construed that Article XIII of the FSM Constitution confers a constitutional right to health care, but if it did then it is likely that there is a right to health care and a public duty to finance medical referral treatment. A right to health care would make a strong legal argument that free medical referral services is an ancillary right. However, in *Carlos v FSM* [xxii] , it is clear that Article XIII (1) of the FSM Constitution does not confer a right to health. The Chief Justice of Supreme Court, in this case, stated:

The precise meaning of this section [Article XIII (1) of the FSM Constitution] is far from clear. The Journal of the Micronesian Constitutional Convention of 1975 indicates that many members of the convention viewed the provision as a commitment by the national government directly to provide education, health care, and legal services. In recommending the provision, the convention's Committee on Civil Liberties stated that it wished to "establish a national policy of providing the services contained in this proposal as the new nation acquires the revenue necessary to implement this policy." SCREP No. 52, II J. of Micro. Con. Con. 881, 882.

However, the committee acknowledged that it would be impossible to provide all of such services. The services spoken of under Article XIII of the FSM Constitution, according to *Carlos* [xxiii] , are therefore merely welfare rights but not a fundamental right. [xxiv] At this point one could assert that there is no right to health, however the national court's ruling cannot be taken to be the position of the law in isolation of the states position. *Why?*

Autonomy of the states

The state's autonomy is an entrenched concept in FSM laws and is one of the foundations of the FSM Constitution. Ms. Marstella Jack emphasized such in her working article in the Journal of the South Pacific, when she reported:

When the framers of the Constitution deliberated over this issue [State Autonomy], it was recognized that whilst a "homogeneous people living in a geographically compact area can perhaps have their aspirations best served by an all powerful national government, nations such as Micronesia which lack the bond of common cultural origin and further lack the advantage of compact geography must permit local autonomy in order to have efficient government, and to avoid the destructive consequences, real or imagined, of domination by one group over another." The FSM Government structure was thus established upon this foundation that there be a union of autonomous states with state rule constitutionally guaranteed. The collective government of all the states is responsible for external affairs and for the solution of all national problems, whereas the individual states are responsible for all other affairs of the government. [xxv] (Emphasize added).

Owing to the federal system of government, the state governments in FSM are very much autonomous in certain public undertakings from the federal government. In most instances, the national court's ruling is binding on the state level, however when it comes to health issues it is a different story. It used to be that national and state governments have concurrent powers over health matters. However, the national government's role in health services was redefined in 1990. Currently, the state governments have full responsibilities for health-related matters [xxvi] meaning public hospitals are state entities rendering the bulk of medical health laws to be under the states' jurisdiction. It is therefore appropriate to review the state laws at this point.

State Laws

State Constitutions

State constitutions are very broad in terms of health care services. For instance, Article 7, Section 4 of Pohnpei State Constitution states:

The Government of Pohnpei shall provide health care services for the public.

Equally the constitution of Kosrae, under Article XII (Titled Education and Health) section 1 states:

(1) The State Government shall promote education and health.

The State constitutions have no equivalent provision to article XIII (1) of the FSM Constitution therefore, making it difficult to construe, on the face of it, that there is a right to health care. However, there are case laws that illuminate the states' position.

The case of *Panuelo v Pohnpei* [xxvii] directly addresses the issue of a right to health care. In this case, Elizabeth Panuelo, an infant child, was admitted to the Pohnpei State Hospital with complaints of bruising and decreased energy and appetite. Local diagnostic testing supported the initial diagnosis of leukemia. She was later sent to Tripler Army Medical Center in Honolulu, Hawaii, where it was discovered that she was suffering from severe aplastic anemia, a condition which without treatment would lead to her death. The defendant (Pohnpei State government) decided against funding a bone marrow transplant that would have saved Elizabeth's life. Elizabeth died. The infant's parents consequently, filed a lawsuit in the FSM Supreme Court against the Government of Pohnpei and the Federated States of Micronesia for damages for the alleged wrongful death of their child. The Plaintiffs claimed that the defendants, by that decision,

violated article 7, section 4(1) of the Pohnpei Constitution, which states:

(1) The Government of Pohnpei shall provide health care services for the public.

The issue before the court was whether article 7 of the Pohnpei Constitution is self-executing, creating substantive rights that individuals can seek to enforce in a court of law. The Appellate Division of the Pohnpei Supreme Court reached a unanimous decision ruling:

...it is the intent of the framers of the Pohnpei Constitution that the Pohnpei Government as the custodian of the welfare of the people shall be empowered and charged to undertake certain specified responsibilities for the educational, cultural and health needs of the people as a whole having regard to the financial constraints of the Government. Since the financial resources of governments all over the world are limited there is no need to say that there is a limit to which a government can provide amenities and services to the people. To think otherwise makes no sense to us.

We are persuaded ... [the] constitutional provision that ...is merely directory and cannot be enforced by the courts... Article 7 of the Pohnpei Constitution merely requires that certain things be done by the Pohnpei Government, without prescribing the result that shall follow, if those things are not done. Any such statute is directory in character... It contains mere matters of direction and are not followed by words of positive prohibition.

Yet another consideration that fortifies us in our view that Article 7 of the Pohnpei Constitution is merely directory is the fact that in contrast to Article 4 which deals with fundamental rights, Article 4 is prohibitive in terms whereas Article 7 provisions are not...Thus the contrasting formats of these two articles of the Pohnpei Constitution lead us to the view that the framers of the Constitution intended to achieve two different objects - by Article 4 to confer legally enforceable rights on individuals; and by Article 7 not to confer such enforceable rights. It takes a rather strange jurisprudence to think that the effect of the two articles in the Constitution is the same. [xxviii]

The Panuelo case reflects the state's disapproval of a right to health. It seems apparent from the excerpt above that the States will not recognize a statutory right to health care. The court in *Panuelo* emphasized that the Constitution of Pohnpei does not confer a statutory right to health care which was the basis of the plaintiff's claim. If there is no right to health then the question that arises now is ***"whether the law imposed a duty on the state hospitals to finance offshore medical referral treatment***"? Given that the law does not recognize a right to health care, determination of the second issue will require two things to be done. Firstly, it must be determined whether the public hospitals have a legal duty to provide health care to medical patients; and secondly it must determine whether the scope of such duty is extended to the financing of medical referral treatment.

Duty To Provide Health Care

There are three FSM cases that delineate FSM position in regards to a public hospital's duty to provide health care to medical patients. The first medical malpractice case that came before the FSM Supreme Court was *Amor v. Pohnpei* [xxix] . In this case, the representative of the deceased (Mr. Amor) brought an action against Pohnpei State Hospital claiming that the State of Pohnpei was negligent in failing, over an unreasonably extended period of time, to provide for the deceased the medicine best suited for treatment of his asthma condition. The estate claimed that this failure eventually caused Mr. Amor's death. The court concluded that:

So long as a state retains its role as the primary provider of health care services in that state, it is legally obligated to make a reasonable effort to provide a health care system reasonably calculated to meet the needs of the people of the state....

However, the claim against the defendant was dismissed because the court found that Mr. Amor's failure to return to the hospital in timely fashion was the primary cause of his death.

A subsequent case that also shed light on the State's position is the case of *Asan v. Truk* [xxx] . In this case, Marsenina Asan died as a result of bleeding following the birth of her son. The doctor did not make any attempt to diagnose the cause of the bleeding. Asan's parents sued the defendant government of Truk (now Chuuk) claiming that their daughter's death was a result of the defendant's negligence. The Chuuk State Court held:

Standard of care for doctors at the Truck State hospital is that they are to exercise professional judgment in the attempt to diagnose the illness of the patient, and then, consistent with available facilities and supplies, act on that diagnosis. [xxxi]

The plaintiff was awarded judgment against the State of Chuuk for $50,000 plus interest. Although the case is more direct on the standard of care, it is apparent here that the court recognized the existence of duty by state hospitals to its patients, when it held Chuuk Hospital as vicariously liable for the doctor's negligence. In other jurisdictions, direct actions against hospital for the failure of the hospital to provide a competent medical practitioner has not yet been established. [xxxii] FSM has taken an initial step.

In *Asher v Kosrae* [xxxiii] , the Kosrae State Court stressed that Kosrae State Hospital is a voluntary provider of health services. One of the issues before the court was whether the State government was negligent in failing to send one of the plaintiffs back to Pohnpei for further medical treatment. The court stated in pertinent part:

...a volunteer who gratuitously offers to provide service or assistance to another, and causes that other to rely upon the offer rather then to seek alternative ways of responding to the need, owes a duty to perform the donated services with reasonable care.

The cases of *Amor* [xxxiv] , *Asan* [xxxv] , *and Asher* [xxxvi] reflect the State's position. The State courts recognized a duty which arises from a general principle of common law - *one who owes no duty and seeks no reward but voluntarily or gratuitously carries out a task nonetheless owes a duty to perform those donated services with reasonable car*e. Therefore, under State law, State hospitals do have a duty to take care of their patients as volunteer health practitioner or provider. The question that arises now is "*Whether such duty is extended to the financing of medical referral treatment*"? The Pohnpei and Kosrae position in relation to issue of medical referral is reflected in their medical referral regulations. [xxxvii] It is appropriate at this point to examine the substance of the Pohnpei and Kosrae Referral Regulations and how it is applied on case-by-case basis.

Medical Referral Regulations

The purpose of the medical referral regulations is explicitly stated in the Kosrae regulation. Section 1.2 of Part I of the Kosrae Medical Referral Regulation states:

Purpose: These regulations provide an impartial process for selecting persons genuinely needing medical treatment outside the State through a medical referral and provide for the payment of the costs of the medical referral.

In practice, when a physician deems that a medical patient needs to be sent off island for further check-up and treatment, he would present the case to the Medical Referral Committee. [xxxviii] The committee is comprised of all the physicians working at the hospital and the Director of Health Services serving as the chairman. [xxxix] Once a case is presented, the committee will review and determine whether or not the

case should be referred. [xl] In Kosrae, the decision must be unanimous to be effective. [xli] In Pohnpei, the director makes the final decision. [xlii]

The Kosrae Medical Referral Regulation is explicit on the criteria that the referral committee's must contemplate before approving a case to be referred. These are:

1. The patient cannot be treated locally due to want of expertise and/or equipment; [xliii] and

2. The expected prognosis for the patient following referral treatment must be reasonably optimistic. [xliv]

In Pohnpei, the criterion for approving a referral case is not explicit. It only prescribes that the referral committee shall review the facts and evidence of each case and make recommendations to the Director for final decision. [xlv] The guiding principles seem to be that all decisions should be made in contemplation of the following:

1. The referral fund is limited;

2. It is awarded to those with the least capability to pay for medical referral;

3. The fund must be fairly and equitably distributed to benefit the patients in need throughout the year. [xlvi]

But even if these elements are fulfilled, the committee still has to secure a doctor and a referral hospital to accept the referral case. If the doctor and the referral hospital accept the case, then the payment will be referred.

The payment of referral service is based on a cost-sharing scheme. [xlvii] The patient and his/her family will be responsible to pay half of the total cost, including medical and hospital bills and others not otherwise covered by a patient's insurance. [xlviii] However, the patient will be held responsible for all cost if it is determined by the Director of Health that the injury or illness requiring medical referral occurred due to the fault of the patient. [xlix] The patient will be responsible for the total cost of transportation. [l]

Eligibility for the medical referral programs is based on being a domiciliary or a government employee of a state. Only citizens and permanent residents of the state are eligible for assistance from the medical referral fund. The referral program is available to those who cannot afford to pay for medical referral. However the sums available under the referral programs are very limited and the high cost of medical care for referral patients quickly depletes the available funds resulting in an unfortunate situation where all request for assistance cannot be accommodated. All the FSM States rely on the grant assistance from the Compact of Free Association [li] to subsidize their referral program. Currently this is the only source of funding and the distribution is about $100, 000 per State each year. The former director of Kosrae Health Service conveyed that sometimes the amount could only accommodate two or three referrals out of ten or more cases per year. [lii] This problem of funding is the crux of the state's conservative approach.

It is conceivable here that the purpose and intent of the referral programs is not to furnish the referral services available to all persons. The eligibility criterion reflects that only those who cannot afford to pay for offshore medical treatment will be considered under the referral program. The cost-share scheme indicate that the state does not have sufficient fund to accommodate all request. All of the above conveys that as far as the state of Pohnpei and Kosrae are concerned the law does not compel the state hospitals to pay for medical referral treatment and services. [liii] There is no compulsory provision of tertiary medical services. The Kosrae State Court in the *Asher* [liv] case confirms that the law does not impose a duty on public hospitals to finance medical referral treatment when it states:

...neither state law nor regulation imposes any duty upon the state to make a medical referral to every person...

The position of the Pohnpei State Courts is also apparent in *Panuelo* when the court ruled that the Director of Pohnpei Health Services has an exclusive discretion to refuse financing of referral patients as long as the decision is based on equitable and fair allocation of resources. In the eyes of the law, provision of medical referral services is a volunteer program and the state or public hospitals are not legally obligated to render a free medical referral program.

The Status Quo; Should it be Reformed?

The status quo is clear – neither State hospitals nor the government have a legal duty to pay for offshore medical referral treatment. But there are a number of suggestions that the law should be changed to cater for free medical referral services. The popular justifications for law reform were collected from a survey questionnaire established for the purpose of this paper. [lv] The survey revealed that 60 out of 100 FSM citizens believe that the government should be responsible for paying for the medical referral cost. Justifications for the change of the law are as follows:

> ***Right to Health***. Most people believe that the law should confer an individual right to health and that free tertiary service should be part of the legal right. Many insisted that a right to health would facilitate equal access to health care.
> ***Customary Duty.*** Many asserted that free public health and compulsory referral services should not be narrowly conceived as an instrument or technical activity. Rather it should be viewed as a duty that is consistent with the customary role of a leader.
> ***Inherent public duty***. The people in FSM are accustomed to free tertiary health services. They want this program to continue. In their belief, it is the solemn obligation of the national and the state government to provide free health services. This belief, as most argue, is consistent with the renowned phrase "government to the people, for the people and by the people".
> ***Panuelo Case*** [lvi] **, a cruel and unfair case?**

The paper will now review and examine the legitimacy of the preceding justifications for law reform. The essential cause of a right to health is simple-if people have medical needs which are not being met, and then it is government's responsibility to meet them. The belief in right to health is widespread and not only in FSM. [lvii] Under this view, universal access may become the unquestionable goal. [lviii] If health care is a right, then the government will be responsible to ensure that everyone has access to it. In other words, those with the ability to provide health care are obliged to serve, while those with a need for health care are entitled to make demands.

A right is a principle that specifies something which an individual should be free to have or do. A right is an entitlement that allows a person to possess something free and clear of others influence. It enables a person to exercise something without permission of others. When speaking of rights, one invokes a concept that is fundamental to our political system. FSM was founded on the principle that individuals possess the inalienable right to life, liberty, along with the right to property, which our framers of the FSM Constitution also regarded as fundamental. [lix] These rights are known as liberty rights, because they protect the right to act freely. The wording of the constitution is quite precise in this regard. It attributes to the people the right to the pursuit of happiness, not happiness per se. But government cannot guarantee the people happiness; that is an individual responsibility. All it can guarantee is the freedom to pursue it. In the same vein, the right to life is the right to act freely for one's self-preservation. It is not a right to be immune from death by natural causes, or even an untimely death.

The right to health is different. It is a right to a good (medical care) regardless of whether one pays for it. The right to health is one instance of a broader category known as welfare rights. Welfare rights in general are rights to goods; for example, a right to food, shelter, education, a job etc. This is one basic way in which welfare rights are different from liberty rights. Welfare rights, however, do not guarantee that one will succeed in obtaining any particular good one may be seeking. Health care does not grow on trees or fall from the sky. The assertion of a right to health care does not guarantee that there is going to be any health care distributed in FSM. The partisans of health right demand that everyone has access to this good. But a demand does not create anything. Health care has to be produced by someone, and paid for by someone.

For FSM, the argument against a "right to health care " is simple. FSM simply cannot afford a free medical referral service scheme. FSM shares a general characteristic with other former colonized countries - continuing economic dependence. The FSM have instigated quite a number of development projects with U.S. assistance. These projects include production of copra, fishing and leasing of fishing rights, cannery industries, forestry, agriculture, and tourism. [lx] However, although significant development progress is evident, it will be decades before FSM will even approach economic development. [lxi] Until then FSM's only alternative to returning to a subsistence economy is to continue infusion of large amounts of economic aid which the US is providing under the terms of the Compact of Free Association (CFA).

The CFA is the main source of revenue for FSM. [lxii] This is an economic agreement between the US and FSM. Under this agreement US Government will transfer to the FSM Government a total of USD 1 billion commencing in 1986. Under this scheme, 75% is to be provided in direct monetary grants, whilst the rest is to come through US funded social, health and education programs. Out of this also, 40% of the annual payments is to be directed to capital improvement projects. The Compact agreement lapsed in 2001 and is currently under negotiation. One thing is certain though FSM lost its once valuable strategic location after the end of the Cold War.

US has already proposed to continue the aid but with a substantial reduction. Given the recent decline in funding under this agreement, the FSM State governments, along with the national government, must start looking elsewhere to offset the reduction in the balance of payments in order to continue to run the governments. Unlike its neighboring countries of Melanesia, FSM is not blessed with rich natural resources. [lxiii] As stated above, each state government is allotted compact funding for medical referral program but the amount is insufficient. According to the Administrator of Kosrae Health Service, Kosrae is getting only $100, 000 per year and the amount could only accommodate two or three referral cases. Based on the above, it is evident that FSM is not capable to fund free health care services. Why does a need or want give someone a right? It makes no sense to assert that a need should confer a right unless FSM has the ability to meet that need.

Another justification for reform is that delegating the duty to the government is appropriate since it is consistent with the customary practice that a leader should always act for collective interest of the people no matter what. [lxiv] In the eyes of most traditional partisans, the role of the government is similar to role of a traditional parent who is the head of the family and has the obligation to provide for his family (the people). [lxv] There is no question that custom plays a vital role in shaping the structure and the order of a Micronesian society but there are many influencing factors that has caused the legitimacy of custom questionable. One of the most influential factors that shape the lives and the laws of FSM is modernization. Mr. Franciz Hexel speak of such when he reported:

Under the impact of modernization today, however, people almost everywhere are witnessing the breakdown of the traditional extended family into what we can call standard packaged families that is, nuclear families composed of father, mother and children, often with a few spare relatives added to the

household... [lxvi]

With FSM embracing economic development and self-sufficiency, change of living standard is inevitable. The preference for an American lifestyle could be traced back as far back to the influx of the American missionaries. [lxvii] Today, people embrace liberalism and often boast about a democratic society. The government is the leading agent for change in FSM and as long as it strives to accomplish self-sufficiency with foreign aid, donors like US will have a say in the laws and the way people live in FSM. On many occasions, the concept of individualism is spoken against. It is considered unacceptable because it infringes on the traditional values, but such spontaneous rhetoric is primarily resorted to defending a cultural identity and that alone. Currently, people in FSM have accepted the principle of individualism. Such is observable in the escalation of individual ownership of land and personal property.

Inherent Public duty- This claim is similar to the preceding claim only this time it asserts a public rather than a customary duty. Once again, it would be senseless to impose a compulsory public duty to state hospitals or the government to subsidize all referral treatment because the government simply does not have the resources to carry out this duty. A free referral system is unheard of in many countries. Even US attempted, during President Clinton's Administration, to establish a free health care system but the mission was abolished due to great difficulty. The slogan "*government for the people, by people and with the people*" is just not pragmatic and relevant when the issue is free medical services especially in a economically constraint country. Considering the current circumstances of FSM, the appropriate slogan, should be "*ask not what your country can do for you, but what you can do for your country*".

Panuelo case - It is not surprising that this case will attract opposition and criticism. The decision seems unfair and cruel especially when the committee approved the referral of the infant and later withdrew its commitment after learning the high cost of the treatment. It seems unfair where Pohnpei hospital volunteered to refer Panuelo for medical, however decided later on to terminate its commitment to fund the treatment after learning the high cost of the treatment. This is a sensitive case because involves an infant and the principle of sanctity of life. But one could argue that the decision in the case was made in contemplation of saving the lives of other candidates for the referral. Surely, it would be unfair that one life is saved in the expense of two or three other lives. It is difficult to draw the line here, but perhaps what FSM have done so far is what exactly needs to be done. After reviewing what the court advised in the popular case of *R v Cambridge* [lxviii] , one may be confident that the law in FSM is sound as it is now. The facts of this case were similar to the facts in *Panuelo* [lxix] . The patient of this case is a 10-year-old girl suffering from leukemia. The health authority decided that treatment, which could be provided privately and might give a 20% chance of success, was not in the child's best interests and scarce resources could not be allocated to it. The decision was challenged by judicial review and the judge upheld the application, holding that the authority reconsidered its decision not to allocate the resources. The Court of Appeal overruled the lower court decision. The Master of the Rolls (Sir Thomas Bingham) said that difficult and agonizing judgments have to be made about how a limited budget is best allocated to the maximum advantage of the maximum number of patients, but that it was not up to a court to make such judgment.

Conclusion & Recommendations

The writer has no recommendation to reform the law because the law as it stands is sound and fits the circumstance of the FSM. There is no question that the main local factor that influences the current position of the law in FSM in relation to medical referral services is allocation of scarce resources. The role of resources in determining the availability and extent of medical provision is crucial in formulation of pragmatic medical law. There is little doubt that, given the relative scarcity of resources in the FSM, the courts will always consider the high cost of medical care and the economic status of FSM crucial when dealing with health laws. To do otherwise would render the laws and judicial decisions not in the best interest of the people.

The present FSM government, both national and state, has taken some measure to curb the problem of medical referral programs by enacting laws and regulations**,** but it is obvious in this paper that there is much more investment needs to be made in informing the public of why the law is the way it is. This is especially essential with a public that has been historically accustomed to a free health and medical referral system. With the public informed, public upheavals will be avoided and confidence of the government will be augmented. Probably the only recommendation is that the government should launch collaboration between the State and national government to facilitate educational task force to educate the FSM people about the law in regards to health and other related issues. There is no question that the FSM people need a paradigm shift to accept that free health care is just not pragmatic in FSM anymore. They need to understand that past norms and customs may not be acceptable in the current situation of FSM.

Finally, the people of FSM must understand that a right to health is just not legally practical in FSM. To impose such a right would lead to other legal constraints and pragmatic inconveniences. FSM people should understand that in America and other Western countries, the attempt to establish free health care has been problematic. Even in these well-developed countries, provision of health services has not kept apace with the increasing demand for medical care. Rights without services are meaningless; no law can be better than its implementation and implementation can be no better than what resources permit.

ENDNOTES

[i] F. X. Hezel, (1995) *How Good Is Our Health?* http://www.micsem.org

[ii] Tertiary health care is also referred to referral programs. M. H. Samo (2001) *Insuring Our Health: Financing Health Care in the FSM* (http://www.micsem.org).

[iii] E. A. Samuel & M. H. Samo (January 2000) *Bringing Health Care to the People: A Look at Dispensaries in the FSM* (http://www.micsem.org).

[iv] The other three entities are the Republic of Palau, the Republic of the Marshall Islands, and the Commonwealth of the Northern Marianas (CNMI).

[v] C. Heine, *Micronesia at the Crossroad* (1974) 11-18.

[vi] See Recent Development, *The Compact of Free Association: An End to the Trust Territory of the Pacific Islands,* 5 B.U. International Law Journal, (1987) 213. Independence was achieved in several transitional steps, beginning with negotiation, followed by the drafting and the ratification of a constitution, the assumption of executive, legislative, and judicial functions, and finally the execution of the agreement with the United States to terminate the Trusteeship.

[vii] Mr. Arthy Nena is the Administrator of the Kosrae Health Service. He was interviewed via email on October 1, 2002.

[viii] See. F.X. Hezel, *How Good Is Our Health?* (1995) *(http://www.micsem.org)*

[ix] Prompted in part by international criticism that followed the 1961 UN Visiting Mission's report on America's misadministration of the Islands, the US Congress moved quickly to increase appropriations to the Trust Territory. See D. Hanlon *Remaking Micronesia* (1998) 167.

[x] Supra, note 8.

[xi] L. Mason. 'Unity and Disunity in Micronesia: Internal Problems and Future Status' in D.T. Hughes & S.G. Lingenfelter *Political Development in Micronesia.* (Ohio State University Press, Columbus, 1974) 208.

[xii] A. D. Pearson, "Pacific Island Health Care Project: early experiences with a web-based consultation and referral network" in *Pacific Health Dialog* (2002) Vol. 7 No. 2.

[xiii] Ibid.

[xiv] In first financial package of the Compact agreement between US and FSM, there is provision for financing off-shore medical referral.

[xv] Supra Note 2.

[xvi] Supra Note 2.

[xvii] Supra Note 3.

[xviii] FSM Constitution. Art. XIII, § 1.

[xix] 4 FSM Intrm. 350, 357 (Yap 1990) **http://www.fsmlaw.org.**

[xx] Ibid.

[xxi] Ibid.

[xxii] 4 FSM Intrm. 17 (App. 1989) (http://www.fsmlaw.org).

[xxiii] Ibid.

[xxiv] The differences between the two types of right will be explained later on.

[xxv] See M. Jack, *The Control of Fishing Resources in the Federated States of Micronesia* (1997) 2 JSPL *Working Paper 1.*

[xxvi] The national governments role was redefined during the 1990 FSM Constitutional Convention. See G. Petersen *The Federated States of Micronesia's 1990 Constitutional Convention: Calm before the Storm? in (1994) Vol. 6, Number 2, Fall 1994, 337-369..*

[xxvii] FSM 3 Interm. 76 (http://www.fsmlaw.org)

[xxviii] *Panuelo v Pohnpei*, see note 27.

[xxix] 2 FSM Intrm. 519, 530-31 (Pon. 1988) **http://www.fsmlaw.org.**

[xxx] *4 FSM Intrm. 51, 56 (Truk S. Ct. Tr. 1989)* **http://www.fsmlaw.org.**

[xxxi] Ibid.

[xxxii] P. Cruz. *Comparative Healthcare Law* (2001) 235.

[xxxiii] 8 FSM Intrm. 443, 451 (Kos. S. Ct. Tr. 1998) **http://www.fsmlaw.org.**

[xxxiv] *Supra*, Note 29.

[xxxv] Supra, Note 35.

[xxxvi] *Supra*, Note 33.

[xxxvii] Kosrae State Medical Referral Regulation (KSMRR) (http://www.fsmlaw.org), & Pohnpei Policies and Guidelines for Medical Referrals (PPGMR)

[xxxviii] Part II section 2.1 KSMRR. Also see section 6 (b) PPGMR..

[xxxix] Ibid.

[xl] Part II section 2.1 KSMRR. Also see section 6 (c) PPGMR.

[xli] Part II section 2.1 KSMRR.

[xlii] Section 6(b) PPGMR

[xliii] Part II section 2.4.1 KSMRR.

[xliv] Part II section 2.4.2 KSMRR.

[xlv] Section 6(b) PPGMR

[xlvi] Recitals, PPGMR.

[xlvii] Part III section 3.1 KMRR

[xlviii] Ibid.

[xlix] Part III section 3.1. KMRR

[l] Ibid.

[li] Due to its economic attachments with the US under the Compact of Free Association (hereinafter CFA), FSM receives annual grant payments worth millions of US dollars to practically run the public sector operations. The CFA provides for a 15 year period whereby the US Government will transfer to the FSM Government a total of USD 1 billion commencing in 1986 and terminating in the year 2001. Section 216 (2) of Article I, Title Two prescribe for medical referral subsidies. The CFA is currently under negotiation.

[lii] This information is obtained thru the phone interview of Rev. Asher P. Asher, former the Speaker of Kosrae State Legislature, former chairman of the Health & Education standing Committee, and former director of the Kosrae State Health Services and former chairman of the Kosrae Referral Committee.

[liii] The two cases, *Asher* and *Panueko,* delineate the states position.

[liv] *Supra*, Note 33.

[lv] See Appendix A.

[lvi] See note 27.

[lvii] Opinion polls in US shows that the belief is widespread even within the medical profession. See D. Kelly *Is there a right to Health Care.*

[lviii] D. E. Beauchmp, *Public Health as Social Justic*e in Hogue, L.L. 1980. *Public Health and The Law: Issues and Trends*. Aspen System Corporation, London. p. 9

[lix] Article IV, FSM Constitution.

[lx] A. Ranney, & Penniman, R. H. *Democracy In The Islands: The Micronesian Plebiscites of 1983* (1985)*2.*

[lxi] Per interview of Mr. Aren Palik, Former CEO Bank of Hawaii (FSM Branch) and member of the FSM Constitutional Convention 2001 (October 1, 2002).

[lxii] FSM Economy (http://www.fsmgov.org)

[lxiii] F. X. Hezel, *Culture In Crises: Trends in The Pacific Today* (http://www.micsem.org).

[lxiv] G. Ashby *Micronesian Customs and Beliefs* (1985) *201-205.*

[lxv] Ibid.

[lxvi] F. X. Hezel, S.J. *The Dilemmas Of Development: The Effects Of Modernization On Three Areas Of Island Life* (http: //www.micsem.org).

[lxvii] H. G. Segal , *Kosrae, The Sleeping Lady Awakens* (1995) 257.

[lxviii] HA ex p B [1995] WLR 898

[lxix] See note 27.

Attachment 1
Survey Questionnaire & Results

1. Do you think the government should be responsible to pay for medical referral treatment?

YES NO

2. Do you think a person should have a right to health?

YES NO Please give reason below

3. If the law does not compel the government to pay for cost of medical referral, do you think the law should be changed to do so?

YES NO Please give reason below

4. Do you think the government should still pay for medical referral treatment even if there is not enough

funding?
YES NO Please give reason below

Results

This questionnaire was conducted via electronic email. 150 people were contacted for this survey. Only 100 responded. The results are as follows.

Question 1----60 yes /40 no
Question 2----81 yes /19 no
Question 3----55 yes / 45 no
Question 4----53 yes/ 47 no
Reasons are stated in the substance of the paper.

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