

When Constitutional Citizenship Diminishes the Political Power of Women – A Case Study of Yap

Kathleen M. Burch
Associate Professor
Atlanta's John Marshall Law School
United States

From the emergence of the first constitutional democracies in western Europe and the United States, those who have been excluded from the nation-making process, particularly women and people of color, have been fighting for inclusion in the political process. The fight for inclusion has usually been defined as the fight for voting rights. The right to vote is essential to participation in the political processes of constitutional democracies. The determination of who can vote or the process for determining who can vote, and thus, who can participate in the political process, is usually defined in a country's constitution. Constitutional citizenship is the identification of which individuals can participate in a country's political process.

In many developed constitutional democracies, including the United States, it is assumed that the right to participate in the political process enables an individual to protect their constitutional guarantees and to shape public policy. This assumption has developed into a theory of constitutional interpretation often referred to as the representation re-enforcement doctrine. The representation re-enforcement doctrine is used by courts as a means to both address the complaint of the constitutional violation and to limit the role of the court in defining positive constitutional rights. In other words, the court before which a constitutional issue is pending will first look to see if the individual bringing the complaint had a voice in the political process. If the individual did not have a voice in the political process, the court will address the process question, issuing a ruling which is intended to create opportunity for the individual to participate in the political process. The court will not address the underlying positive constitutional right issue because now that the political process has been fixed, the individual should be able to protect her positive right through the political process.

The representation re-enforcement doctrine is a particularly useful tool for courts in countries where separation of powers issues predominate. Courts can appear to be addressing constitutional concerns without actually defining constitutional rights beyond the now well-accepted principal of one man, one vote. By not addressing the substantive constitutional issue, courts are leaving the process of defining constitutional rights to the political branches of government – the executive and legislative branches. When a country's constitution clearly places fiscal decisions with the elected branches of government and the result of defining the constitutional right is to create a financial burden on the government, the court may well not have the power to define the parameters of the constitutional right. But, where money is not at issue and defining the constitutional right will not create a financial burden on the government, the court may be shirking its duties when it fails to address the substantive constitutional issue. Moreover, when a constitutional court fails to address the underlying

substantive constitutional issue, the court fails to recognize that sometimes fixing the process is not sufficient to protect the constitutional guarantee at issue.

While the representation re-enforcement doctrine may be useful in established democracies whose constitutional guarantees focus on individual rights which are well-defined, it may not be an appropriate or useful doctrine in emerging democracies whose prior political systems included concepts of shared or communal political power. When emerging democracies adopt constitutional democracies which include the concept of one man, one vote, the country is choosing an individual modality over a communal modality. In countries where the prior political system included concepts of community consensus and where political power was exercised by groups and not individuals, the adoption of a constitutional democracy based upon individual voting rights will disrupt the prior political structure and thus, the prior distribution of political power. In communities where women exercised political power as a group through consensus building, the disruption of the prior political structure can result in a diminution of the political power women under the constitutional democracy.

A case study: Yap, Federated States of Micronesia¹

On paper, the women of the Federated States of Micronesia (FSM), including the women of Yap, began their lives as constitutional citizens of a country with political and individual rights that women in many other developing countries may not enjoy. The FSM Constitution and the Yap State Constitution² grant suffrage to all citizens, including women, 18 years and older. Neither the FSM Constitution nor the Yap State Constitution prohibits women from holding public office. Moreover, both the FSM Constitution and the Yap State Constitution guarantee women equal protection of the law. The FSM and Yap State adopted constitutional guarantees as guaranteed by the U.S. Constitution and interpreted by the U.S. Supreme Court. These constitutional guarantees, however, have not been sufficient to protect women's rights. Although Yapese women can and do vote, they have failed to maintain the political position in society that their mothers and grandmothers held.

Yap is still known as the most traditional of the Micronesian islands. The Yapese traditional political system continues to co-exist with the constitutional democracy, sometimes as a parallel system and sometimes intertwined with the constitutional institutions. The traditional system continues to control traditional issues, leaving non-traditional issues to the government. The demarcation of jurisdiction between the traditional system and the government has never been clearly defined. Moreover, both the FSM and Yap Constitutions recognize the importance of traditional leaders and require the courts to interpret statutes and decide cases consistent with Micronesian custom and tradition.³ Under the Yap Constitution,

¹ Yap, a group of islands, is one of the four states of the Federated States of Micronesia. The islands of the Federated States of Micronesia were part of the Trust Territories of the Pacific Islands, administered by the United States as Trustee from the surrender of Japan in World War II until 1982.

² The FSM Constitution and Yap State Constitution are available on the FSM's Legal Information System website located at <http://www.fsmlaw.org/> (last visited on Jul. 24, 2009).

³ Most custom and tradition is not written.

the Council of Pilung (council of traditional chiefs) operates as an unelected fourth branch of government which to date has not had any women members.⁴

To understand how the current constitutional structure has eroded women's political power, one must understand some of the basics of the Yapese traditional system. At first glance it may well appear to an outsider that Yapese women did not have much power under the traditional system. But, once the intricacies of the system are understood, especially the importance of the control of land, it becomes apparent that Yapese women did, in fact, have and exercise political power.

The Land and Women's Control of It

Land is central to Yapese custom and tradition. That which is scarce becomes more valuable. Nothing is more scarce in Yap than land. Land not only denotes wealth, but identifies one's specific place in Yapese society.

Every piece of land holds a name. With each piece of land runs rights and obligations within Yapese custom and tradition. The rights and obligations belong to the land. An individual's Yapese name comes from the land. The name denotes the child's relationship with other members of the clan. It identifies from whom the child can seek assistance and protection. It identifies those individuals that the child must assist and care for within the clan. The name also identifies those individuals for whom the child will be responsible.

Every male child is given the name of a piece of property which belongs to his family. The male name identifies the child's social position, identifies the child's obligations to the village, to his family, and to others, and identifies the child's rights or privileges. Every female child is given the name of one who has worked the land which belongs to her family. The female name also identifies the land over which the woman has right of control, i.e. the land over which the woman is caretaker. Both male and female names indicate the individual's position within Yapese society including the family/clan to which the individual belongs.

Under the traditional system, the land was believed to be held in something akin to a trust for future generations. The land's current namesake was only a temporary guardian of the land and was required to maintain the land such that it could sustain future generations. Land was not, and still is not, freely alienable. One who does not fulfill their obligations to the land and thus, to the community can have their name taken away, losing their position within Yapese society.

All traditional positions, including political positions, ran with the land. It is the piece of land which is the pilung or chief. The individual is privileged to carry the name and care for the land and, in return, must fulfill the obligations which run with the land.

Under Yapese custom and tradition, the power to give and the power to take away a person's name is the power to designate a person's place in society, including political position.

⁴ Although eligible, women have never served as elected officials of the constitutional government (governor or member of the legislature) or as appointed judges of the constitutional courts.

The ability to name your political leaders or take away their name, and thus their position of political power, is the ability to exercise political control.

Naming a Child

Traditionally, Yapese parents do not name their children. The child's name is chosen and given by the child's father's sisters. The mother's family is not involved in naming the child, because the land from which the male child's name comes and the land over which the female child will have control belongs to the child's father's family or clan. The right to name the child belongs to the women, usually the child's aunts, of the father's clan.

The child's father's sisters also retain the right to take a name away. A name can only be taken away for failure to fulfill one's obligations. One of the most common causes for taking a name away is the failure to care for one's parents as they age. As with naming a child, the decision to take a name away is made by the group of female relatives who have reached a consensus regarding the person's behavior. When the women of the clan take a name away, it is usually taken from a grown person. Once the name is taken away, the individual no longer has any of the rights or privileges which ran with the piece of land for which he was named. The individual has lost more than a name. The individual has also lost the right of his or her future children to receive names from the clan.⁵ The individual has lost his or her place in society and possibly also the place of his or her children in society.

When Two Worlds Collide

Because there is no clear demarcation between the issues which should be determined through the traditional system or those which should be determined through the government process and because issues which in the past had been determined through traditional group consensus decision-making processes are now being made by government officials, the political power traditionally exercised by women is becoming increasingly irrelevant. The essence of the political power traditionally held by women was that the fact that women controlled the land. By controlling land, women controlled the economy by controlling wealth (the more land, the more wealth or the more ability to create additional food or other items for trade); women controlled existence (land meant subsistence - the ability to grow food and eat); and women controlled political power by naming the future chief and thus, the line of political succession. The strength of women's political power came from the fact that women acted as a group, a group in which all of had the opportunity to speak and thus, to shape the decision.

With the adoption of a constitutional democracy which emphasizes the individual, one man, one vote model, political power is now viewed as the ability to vote, not the ability to control the land. Moreover, with a constitutional democracy comes the need for a government center. A government center creates jobs in a money economy. Jobs stimulate economic growth, which usually includes the development of a housing market with rental units. This has

⁵ The author is personally aware of at least one incident where a child had not received a Yapese name because the child's father's aunts believed that the child's father had not fulfilled his obligations to the family and, in particular, the child's grandfather.

occurred in Yap with the result that an individual no longer needs clan land on which to live and raise a family. When one no longer needs the clan land and where one can exercise individual power through the vote, one can risk the anger of one's aunts because the loss of one's traditional name no longer means the loss of one's status in society.

Constitutional Citizenship

Although women were granted constitutional citizenship in both the FSM and Yap Constitutions, that constitutional citizenship is not an adequate substitute for the political power exercised under the traditional system. Under the traditional system, when women used their political power as a group, women were able to effectuate change and were able to ensure that women, children, and the elderly were adequately cared for by the community. The survival of the clan required that all members of the clan fulfill their obligations to the clan. It was the duty of the women to insure that these obligations were fulfilled.

Constitutional citizenship and the rise of a money economy has eroded the perception of the importance of land within the community. The ability to migrate to town – the government center – or even abroad to the U.S. has negated the need to have land in the village. One can survive without land and thus, without having to fulfill one's obligation to the land, without having to fulfill one's obligation to the clan.

Because the traditional system and the constitutional government coexist without clearly defined responsibilities, many issues, such as domestic violence, child abuse and neglect, and women's equality, which were previously addressed through traditional mechanisms where women had a voice and could exercise political power are not being adequately addressed. The constitutional government assumes that because these issues are issues which were, in the past, addressed by the traditional system, the issues are still being adequately addressed by the traditional system. The constitutional government has failed to recognize that the adoption of an individual constitutional model has eroded important aspects of the traditional system which had acted as a safety net for women and children. The constitutional guarantees as interpreted by the U.S. Supreme Court and embedded in the FSM and Yap State Constitutions are insufficient to replace the traditional mechanisms which have been eroded by the adoption of a constitutional democracy and the grant of constitutional citizenship to Yapese women. The focus on individual constitutional rights guaranteed by the Constitutions has been insufficient to replace the exercise of communal political power traditionally exercised by women for the betterment of the community.