Eberdong v. Borja, 10 ROP 227 (Tr. Div. 2003)

NGIRATECHEBOET EBERDONG,
and SEVENTH KOROR STATE LEGISLATURE,
Plaintiffs,

v.

SANTOS BORJA, GREGORIO DECHERONG,
SALLY TECHITONG-SOALABLAI, and BAUDISTA RENGULBAI,
Defendants.

CIVIL ACTION NO. 03-299

Supreme Court, Trial Division
Republic of Palau

Decided: September 23, 2003

LARRY W. MILLER, Associate Justice:

This matter is before the Court on plaintiffs' motion for a preliminary injunction and on cross-motions for summary judgment. Because there are no disputed facts, the Court has determined to bypass plaintiffs' request for preliminary relief and turn directly to the merits, granting plaintiffs' motion for summary judgment and denying defendants' motion.

The Koror State Constitution, Article VIII, Section 11, provides as follows: "The ⊥228 electorate may recall an elected member of the Legislature pursuant to law. No member shall be recalled from office during the first term of office." On August 15, the Election Commission, of which defendants Borja, Decherong and Techitong-Soalablai are members and defendant Rengulbai is Executive Director, was presented with a petition for the recall of Ngiratecheboet Eberdong, the Koror State Legislator elected from Ngerchemai Hamlet. On August 25, the Speaker of the Koror State Legislature wrote to the Commission asserting that Article VIII, Section 11, is not "self executing," and requesting that the Commission "wait for the adoption of a Koror State law that sets forth the grounds and procedures for a recall petition" before taking further action. Notwithstanding, on September 4, the Commission adopted "Rules and Regulations for Recall Election, Ngerchemai Legislator, Koror State, Republic of Palau," citing the authority granted it by 23 PNC § 1005.[1]

---

[1]

> **Conduct and supervision of state elections.** Any provision of any state law to the contrary notwithstanding, the Election Commissioner shall have overall authority and responsibility for the conduct of all elections, the registration of all voters, the tabulation of all votes, and the announcement of the official results of all state elections in accordance with all provisions of the applicable state law governing the election which are not inconsistent with the provisions of this section; provided, that if there is no applicable state law governing any state election or to the extent that such law does not fully provide for the conduct of such election, the registration of voters, the tabulation of votes, or the announcement of official results, the Election Commissioner shall formulate

Section 1 of these Rules and Regulations provides as follows:

> Recall Election. The people may recall a member of the Legislature from office. A recall is initiated by a petition which shall name the member sought to be recalled, state the grounds for recall, and signed [sic] by not less than twenty-five percent (25%) of the number of persons voted [sic] in the most recent election for that member of the Legislature. A special recall election shall be held not later than sixty (60) calendar days after the filing of the recall petition. A member of the Legislature shall be removed from office only with the approval of a majority of the persons voting in the election, and such vacancy shall be filled by a special election to be held in accordance with law. A recall may be sought against an individual member of the Legislature no more ⊥229 than once per term. No recall shall be permitted against a member who is serving the first year of his term in the Legislature.

Section 2 then scheduled a recall election for October 8, 2003.[2] On September 12, plaintiffs brought this action asking the Court, among other things, to declare that Article VIII, Section 11, is not self-executing, and to enjoin the scheduled election from going forward.

It is fair to say that Palauan jurisprudence, at least of the last decade, views with great skepticism any suggestion that a constitutional provision is not self-executing. Prior cases have enunciated "the principle that constitutional provisions are presumed to be self-executing–'that every provision in the Constitution has content and meaning which may be given immediate effect.'" *Senate v. Nakamura*, 7 ROP Intrm. 212, 213 (1999) (quoting *Gibbons v. Etpison*, 4 ROP Intrm. 1, 4 (1993)). The Court should be particularly skeptical, it believes, where the legislature as a whole, and the legislator who is the target of a recall effort, argue that they cannot be recalled by their constituents until they have acted to implement the recall provision of the Koror Constitution–something that they have yet to do in the twenty years since the Constitution was adopted.

Nevertheless, the presumption that constitutional provisions are self-executing is just that, and the Appellate Division has identified two guidelines for determining when that presumption has been overcome:

> 1) Where we cannot determine the scope or nature of the right from the language of the provision even with full recourse to the full panoply of interpretive devices which courts normally use to divine the meaning of constitutional language; or 2) where the provision reflects an intention of the framers that it not be implemented

---

> regulations to govern such election which shall be substantially similar to the provisions of this title with due recognition for local conditions. Such regulations shall have the force and effect of law.

23 PNC § 1005.

[2]The remainder of the Rules and Regulations set forth procedures for registering to vote, voting, and tabulating votes for the scheduled election.

until legislative or other action is taken.

Gibbons, 4 ROP Intrm. at 4. In *either* situation, the Court should find that a particular provision is not self-executing; here, the Court believes that *both* situations are present.

The first guideline quoted above recognizes that constitutional language is often imprecise, and makes clear that such imprecision is *not* a basis for finding that a provision is not self-executing, so long as courts can give meaning to it in the way courts usually do. Thus, in *Gibbons*, the fact that it was necessary to interpret the term "registered voters"–registered voters at what point in time?–was not "a sufficient reason to conclude that [the initiative provision of the Constitution] is not self-executing." 4 ROP Intrm. at 5. Similarly, in last year's litigation over the national recall election, this Court was required to interpret the meaning of "the number of persons who voted in the most recent election for that member of the Olbiil Era Kelulau" as used in Article IX, Section 17, of the Constitution, *see* n.4 *infra*, yet neither side suggested that the provision was not self-executing. *See Andres v. The Palau Election Comm'n*, Civil Action No. 02-220, at ⊥230 5 (July 11, 2003).

In contrast with the initiative and recall provisions of the national Constitution, however, the recall provision of the Koror State Constitution, quoted in full above, does not even offer a starting point for interpretation. The single sentence–"The electorate may recall an elected member of the Legislature pursuant to law"–does not offer any clue either as to what percentage of voters must sign a recall petition (10%? 25%? 51%?) or as to what percentage must vote in favor of the recall (51%? two-thirds? 75%?) to actually remove a legislator from office.[3]

In adopting Section 1 of its Rules and Regulations, *see supra* p. 228-29, the Commission does not purport to have "interpreted" these numbers from the language of the Koror Constitution; rather, acknowledging that there were gaps to fill, and believing that it had a duty to fill them, *see infra* p. 231, the Commission simply copied nearly verbatim the particulars of the national recall provision.[4] But the numbers chosen by the framers of the Palau Constitution,

---

[3]Nor does it provide any other details about the recall process. *See, e.g.*, 63C Am. Jur. 2d *Public Officers and Employees* § 206 (1997) (contrasting jurisdictions where "the electorate has an absolute right to recall public officers for any reason or no reason" with those where "the removal petition must contain good and sufficient reason for removal"). The second sentence of the provision–prohibiting recall during the first year of a term–imposes one concrete limitation on the right of recall, but obviously does not help to answer the questions posed above.

[4]*Compare* Section 1 of the Rules and Regulations *with* Article IX, Section 17:

> The people may recall a member of the Olbiil Era Kelulau from office. A recall is initiated by a petition which shall name the member sought to be recalled, state the grounds for recall, and be signed by not less than twenty-five percent (25%) of the number of persons who voted in the most recent election for that member of the Olbiil Era Kelulau. A special recall election shall be held not later than sixty (60) calendar days after the filing of the recall petition. A member of the Olbiil Era Kelulau shall be removed form office only with the approval of a majority of the persons voting in the election, and such vacancy shall be filled by a special election to be held in accordance with law. A recall may be sought against an individual member of the Olbiil Era Kelulau

while obviously not unreasonable, are also not inevitable. A quick perusal of other state constitutions[5] shows that the percentage of voters required to sign a recall petition varies from the 25% required in the national Constitution to 30% (Peleliu) to 35% (Ngarchelong, Ngchesar) to 45% (Sonsorol), and the percentage of votes required to remove a legislator varies from a majority in many constitutions to 65% (Kayangel) to 75% (Hatohobei). In the ⊥231 Court's view, there are no "interpretive devices" available that would enable it to divine from the language of the Koror Constitution either the numbers used by the Commission or the various alternatives contained in these other constitutions. As such, the Court believes that Article VIII, Section 11, is not self-executing under the first guideline set forth in *Gibbons*.

For similar reasons, the Court believes that the Koror recall provision also falls within the second guideline for discerning that a provision is not self-executing, which is that it "reflects an intention of the framers that it not be implemented until legislative or other action is taken." At least three reasons support this conclusion. The first is the absence, as discussed above, of *any* details about how the recall procedure should operate. This absence, in addition to giving a court nothing to interpret, also evinces an intention to require the legislature to work out those details in legislation. Second is the use of the words "pursuant to law." While these words perhaps do not compel the conclusion that a particular provision was not intended to be self-executing, they certainly point in that direction. *See, e.g.*, *Kiuluul v. Obichang*, 2 ROP Intrm. 201, 203-05 (1991). Finally, there is direct evidence of the framers' intent, namely, their discussions at the Koror State Constitutional Convention. As reported in the Seventy-second Day Summary Journal (April 10, 1983), when the question was raised as to "how many voters are required to recall a member from office," the response was that "the reporting committee had decided to leave that question to future legislation," and the provision "was then accepted without any change" shortly thereafter. *Id.* at p. 20. For all of these reasons as well, the Court believes that Article VIII, Section 11, was not intended to be self-executing.

Perhaps anticipating this conclusion, the Commission argues that the question whether Article VIII, Section 11, is self-executing or not is rendered irrelevant by 23 PNC § 1005. *See* n.1 *supra*. Even if it is not self-executing, and even if the Legislature has not taken steps to implement it, the Commission argues that § 1005 empowers, and indeed requires, it to promulgate regulations and go forward with a recall election. With respect, the Court must disagree. The pertinent portion of § 1005 mandates the Commission to formulate regulations for "any state election" where state law "does not fully provide for the conduct of such election, the registration of voters, the tabulation of votes, or the announcement of official results." As the Court reads it, the applicability of § 1005 is premised on there being a need for a state election to be held: If the state constitution or state law requires that an election be held, *then* the Commission is empowered and required, where necessary, to set out the procedures for conducting it. Seen in this light, most of the Rules and Regulations promulgated by the Commission are unobjectionable. *See* n.2 *supra*. Section 1, however, in establishing the

---

no more than once per term. No recall shall be permitted against a member who is serving the first year of his first term in the Olbiil Era Kelulau.

[5]The Court has referred to the versions of the state constitutions contained in Volume III of the first edition of the Palau National Code, and does not know whether any of them have since been amended. Even if they have, the point is still the same that these numbers are variable.

percentage of signatures needed to call for an election, goes beyond the "conduct" of elections (and the "registration of voters," "tabulation of votes," and "the announcement of official results") and puts the Commission in the position of defining when an election is necessary in the first place. The Court does not believe that the Commission may bootstrap its authority to "conduct" state elections into the authority to implement state constitutional provisions that were intended by the framers of that constitution to await state legislation.

Kiuluul v. Obichang is not to the contrary, the Court believes, and, if anything, helps to illustrates this point. The Appellate ⊥232 Division there appeared to agree with the proposition that "even if Article VII, Section 13, [of the Airai State Constitution] is not self-executing, 23 PNC 1005 provide the means for the National Election Commissioner to conduct the election." 2 ROP Intrm. at 206. However, the Court believes that the Appellate Division was somewhat imprecise in declaring that this provision was not self-executing. The Airai recall provision largely tracks the national Constitution and contains the percentages and other details that are lacking from the Koror recall provision. The only portion of the Airai provision that was found not to be self-executing was the requirement that "the Governor shall provide for a recall election to be held pursuant to law." That is to say, it was clear in that case what the requirements for a recall election were under the Airai State Constitution, and that those requirements had been met, so all that needed to be done was to prescribe the procedures for it. Here, by contrast, without Section 1 of the Commission's Rules and Regulations, there is simply no basis to say that there is to be a recall election in Koror State for which the Commission must prescribe procedures. To the contrary, given the Court's conclusion that Article VIII, Section 11, is not self-executing, and given the absence of any implementing legislation, the only possible conclusion is that–as matters now stand–the Koror Constitution and Koror state law do not call for any election to be held, and thus there is no "state election" to bring § 1005 into play.

The Court will accordingly issue a judgment declaring that the Rules and Regulations scheduling the upcoming election are to that extent invalid and enjoining that election from going forward. Having said that, the Court believes it worthwhile to make clear a number of questions that are not answered by its decision today. First, it notes that the proponents of the recall petition are not parties to this case and there has thus been no consideration as to what remedy they may have, if any, if the Koror State Legislature fails to adopt legislation implementing Article VIII, Section 11. Second, the Court has obviously not considered the validity of the legislation now under discussion, and whether there are any limitations on how the Legislature may go about implementing the right of recall.[6] Finally, although the injunction granted is "permanent" in the sense that there is nothing further to be litigated in this case, the Court does not address the continuing viability of the current recall effort in the event, because of

[6]To use extreme examples, the Court is highly doubtful, for example, that the Legislature could require that recall petitions be signed in blood, or only on Tuesday evenings when the moon was full. On the other hand, the Court is also highly doubtful of the Commission's argument that any implementing legislation must conform to the particulars of the recall provision of the national Constitution. Article IX, Section 17, by its plain terms, relates only to the recall of "a member of the Olbiil Era Kelulau" and not any state officeholders. Given that the Guaranty Clause of the Constitution does not even require that all public officials be elected, *see Koror State Gov't v. Becheserrak* , 6 ROP Intrm. 74, 76-77 (1997), the Court can see no basis for holding that state constitutions must provide for recall in the first place, much less that such provisions must mimic the national Constitution in all respects.

future legislation or further litigation, circumstances change. All of these questions remain for another case and another day.