Seventh Koror State Legislature v. Borja, 12 ROP 206 (Tr. Div. 2005)

SEVENTH KOROR STATE LEGISLATURE and YOSITAKA ADACHI,
Plaintiffs,

v.

SANTOS BORJA, GREGORIO DECHERONG, PRESLY ETIBEK, SALII TECHITONG SOALABLAI, and BENJAMIN YOBECH,
Defendants.

GOVERNOR JOHN C. GIBBONS, in his official capacity as Governor of Koror State,
Intervenor.

CIVIL ACTION NO. 05-120

Supreme Court, Trial Division
Republic of Palau

Decided: June 9, 2005

LARRY W. MILLER, Associate Justice:

Plaintiffs, the Koror State Legislature and Yositaka Adachi, who is its Speaker and a registered voter, filed this action seeking to compel defendants, the members of the Election Commission, to go forward with a referendum on certain proposed amendments to the Koror State Constitution on June 23 of this year. Defendants had declined to do so, having concluded that the Koror State Constitution calls for proposed amendments to be voted upon at the next general election, which is to be held in November of this year. Governor John C. Gibbons has intervened in the action in support of the Election Commission. Pursuant to ROP R. Civ. P. 65(a), it was agreed that the hearing on plaintiffs' motion for a preliminary injunction would also constitute the trial on the merits. That hearing having been completed, and writing closing arguments and rebuttal arguments having been submitted, the Court now issues this opinion as its findings of fact and conclusions of law.

The dispute in this case rests on a potential discrepancy in the Palauan and English versions of Article XI, Section 2, of the Koror Constitution. The Palauan version, quoted in full below,[1] says that proposed amendments must be agreed to by a majority of the votes cast "er sel klou el sengkyo er a beluu." The English version, also quoted below,[2] provides that the amendments shall be voted upon "in a State-wide referendum."
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It is plaintiffs' position that the framers of the Koror Constitution intended an open

[1]"Ngidil uldasu er a omeldechel tia el Uchetemel a Llach a mo tekoi alsekum mete kongei er ngii er sel klou el sengkyo er a beluu a rubdois er a ildisir a rechad el mlo sengkyo."
[2]"RATIFICATION. Any proposed amendment to this Constitution shall become effective when approved in a State-wide referendum by a majority of the votes cast on that amendment."

amendment process by which proposed amendments would come before the voters promptly and without waiting for the next general election to take place. They say that their view is plainly stated in the English version of the Constitution and that it is a possible reading of the Palauan version.

Defendants and intervenor contend, by contrast, that the phrase "klou el sengkyo" used in the Palauan version is a term of art used invariably to describe general elections and that, to the extent the English version is different, it must give way pursuant to Article X, which provides that "in case of conflict the Palauan version shall prevail."

In the ordinary course of constitutional interpretation, the Court begins with the constitutional language and, only if that language is ambiguous, does it then turn to constitutional history and other secondary evidence. Here, the Court believes that the language is sufficiently ambiguous to allow the consideration of historical evidence, but ultimately concludes that the history raises more questions than it answers. So the Court will briefly discuss that history and then turn back to the language itself.

The legislative history, as set forth in the Fifty-fourth Day Summary Journal of the Koror State Constitutional Convention, and as testified to Grace Yano, makes clear at least that the committee that drafted Article XI *did* intend to create an "open amendment process" to allow amendments to be considered at any time.[3] But the same summary journal, and the testimony of Grace and Rubasch Santos Olikong, who attended the convention as the representative of Rekesiuang James W. Gibbons, also make clear that the proposal was the subject of immediate debate, with several speakers embracing the view that allowing the constitution to be freely amended would decrease the dignity of what was intended to be a lasting document. Moreover, the written history does not show how that debate was ever resolved. Plaintiffs concede, as they must, that the fifty-fourth day's discussion ended inconclusively, with the delegates voting to defer further action on the proposal; and, although Rubasch testified that the delegates voted at some point in favor of a "closed" amendment process, there is no written record of such a vote ever having occurred.

The issue is further complicated by the fact that neither the proposals nor the committee reports discussing them have been preserved, and thus it is impossible to know what the delegates had before them during the debate on this issue. It is clear that the debate itself was in Palauan, and there seems to be no dispute, as testified to by Isabella Sumang, that all proposals were translated into Palauan for the benefit of the rubaks and mechas who were not comfortable with English. But the summary journal also shows that the report of the drafting committee was available in English, and it seems altogether likely, therefore, that the delegates had both an ⊥208 English and a Palauan version available as they debated the issue. If it were clear that the

[3]According to Grace, the convention was divided on many issues, and several delegates to the convention, already dissatisfied with certain aspects of the proposed constitution, wanted to be able to propose changes to it without delay. It seems fair to say that the lengthy litigation in *Becheserrak v. Koror State Gov't*, Civil Action No. 166-86, and the recent flurry of lawsuits between and among the Legislature, the Governor and the House of Traditional Leaders can be traced back to that initial divide twenty-two years ago.

English and Palauan versions of the proposal contained the same language as now appears in the Koror Constitution, that the proposal was described to the delegates as creating an open amendment process, and if the delegates had then adopted the proposal, then the Court would be inclined to resolve any ambiguity in plaintiffs' favor as reflecting the delegates' true intention. But we do not know whether the language is the same and, more importantly, the delegates did not adopt the proposal at that time.[4] The legislative history therefore affords no basis to determine conclusively the framers' intent.

All of which leads the Court back to the language of the Constitution. The Court has previously expressed the view, and adheres to it today,[5] that "it should not lightly conclude that there is a conflict between the two versions [of the Constitution] but should rather strive, if possible, to find a single interpretation that gives effect to both." *Seventh Koror State Legislature v. Gibbons*, Civil Action No. 03-012, at p.7 (May 6, 2003), *rev'd on other grounds*, 11 ROP 97 (2004).[6]
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Having said that, however, the Court finds here that the conflict is unavoidable. Were the Court translating on a clean slate, it would be inclined to say that "klou el sengkyo er a beluu" -- literally meaning "big state election" -- is broad enough to be read consistently with the "State-

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[4]Both sides seek to draw significance from the experience with respect to Resolution 43, which was the subject of the *Becheserrak* litigation. Intervenor points to the fact that, there, the Legislature had proposed that the amendments be voted upon at the next general election. Plaintiffs, on the other hand, point out that the Resolution was ultimately voted upon before the next general election was scheduled to take place.

Intervenor's argument is weakened by the fact that Resolution 43 was passed in June of a general election year. That the Legislature then (unlike the current plaintiffs) was willing to wait five months does not prove that it acceded to the view that that was the only time at which the matter could be considered. Likewise, that the vote was ultimately taken without waiting for the next general election ignores the fact that that election was decreed as a judicial remedy after eleven years of litigation. Since any suggestion by defendants in that case that the vote should be delayed would likely have received a hostile reception from the Court (which had been ordered by the Appellate Division "to set a date as soon as practicable by which Resolution 43 must be put to a vote," *Koror State Gov't v. Becheserrak* , 6 ROP Intrm. 74, 79 (1979)), their failure to make such a suggestion is also not particularly telling.

[5]The Court should note that it was somewhat shaken in this view when it realized, through the testimony of Isabella Sumang, that even the language of the "conflict" provision, Article X, is in conflict. In its previous decision, the Court cited the English version, which says that the Palauan and English versions of the Constitution "shall be equally authoritative." As Isabella testified, however, the Palauan version doesn't say that. It says only: "Tia el Uchetemel a Llach a llechukl el tekoi er a Belau e mo moiuid el mo tekoi era English." ("This Constitution is written in Palauan and will be translated into English.")

[6]Because the constitutions of the United States and of the fifty states are written in English only, there is no U.S. constitutional law that deals with the problems of conflicting languages. However, the law with respect to treaties, which are often bilingual, is consistent with this approach. *See generally* 74 Am. Jur. 2d *Treaties* § 29 (2001) ("In as much as a treaty must be construed as a whole, where it is executed in two languages, both versions are originals, and both must be deemed as intended by the contracting powers to be identical in meaning. Accordingly, a construction must be sought which will bring the terms of the two languages into harmony with the other."). Here, of course, the declared primacy of the Palauan version offers an escape clause where the language simply cannot be harmonized.

wide referendum" language of the English version and need not necessarily be read to mean "general election." But defendants' position that "klou el sengkyo" is a term of art -- and was at the time of the drafting of the Koror Constitution -- is supported by the testimony of Masaharu Tmodrang, who testified as an expert on Palauan language,[7] and borne out by an examination of other clauses of the Koror Constitution and of the national Constitution which had been written just a few years earlier. In every other place where "klou el sengkyo" appears in the Koror Constitution, *see* art. VII, § 2; art. VIII, § 8; *see also* art. VIII, § 5 ("klou sengkyo"); and wherever it appears in the national Constitution, *see* art. IX, §§ 4(a), (b), (c), 8; art. XIII, § 3; art. XIV, § 2; art. XV, § 13(b); it is translated as "general election." Conversely, the words "klou el sengkyo" are never used in any other provision of either Constitution where a special or otherwise indeterminate election is intended. *See* Koror Const. art. V ("sengkyo er a beluu"/"state elections"); art. VIII, § 12 ("ileakl el sengkyo"/"an election"); Palau Const. art. VIII, §§ 3 ("sengkyo"/"election"), 4 ("sengkyo er a Belau el rokir"/"nationwide election"), § 10 ("sengkyo er a Belau el rokir"/"nationwide . . . referendum"), § 11 ("sengkyo er a Belau a rokir"/"national election"); art. IX, § 7 ("tokubets el sengkyo"/"special election"); art. XIII, § 12 ("sengkyo er a Belau el rokir"/"nationwide referendum"). Given such otherwise unvarying usage, the Court concludes that here, too, "klou el sengkyo" should be read to mean general election, and that plaintiffs' request to require the Election Commission to hold the election on an earlier date must be denied.

The Court recognizes that in reaching this conclusion, it is making a finding that the framers of the Koror Constitution adopted and submitted to the voters for approval a document that, at least in this one respect, contained an irreconcilable conflict between its two versions. In one of their briefs, plaintiffs ask why they would have done this, rather than resolve the issue back then. The Court cannot explain why; it can only say that -- as best it can tell -- that is what happened.

[7]Although Masaharu seemed at one point during cross-examination to agree with plaintiffs' counsel's suggestion that the Palauan and English versions did not conflict, he seemed to reverse himself on redirect. That inconsistency aside, however, he did not waver in his view that "klou el sengkyo" means "general election" -- which is decidedly in conflict with the English version as interpreted by plaintiffs.